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*Addition to*  
TRANSCRIPT OF RECORD.

*2*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 325

BROOKS-BRANLON COMPANY, PETITIONER,

RAILROAD COMMISSION OF LOUISIANA.

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE  
OF LOUISIANA.

(27,138)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 386.

BROOKS-SCANLON COMPANY, PETITIONER,

*vs.*

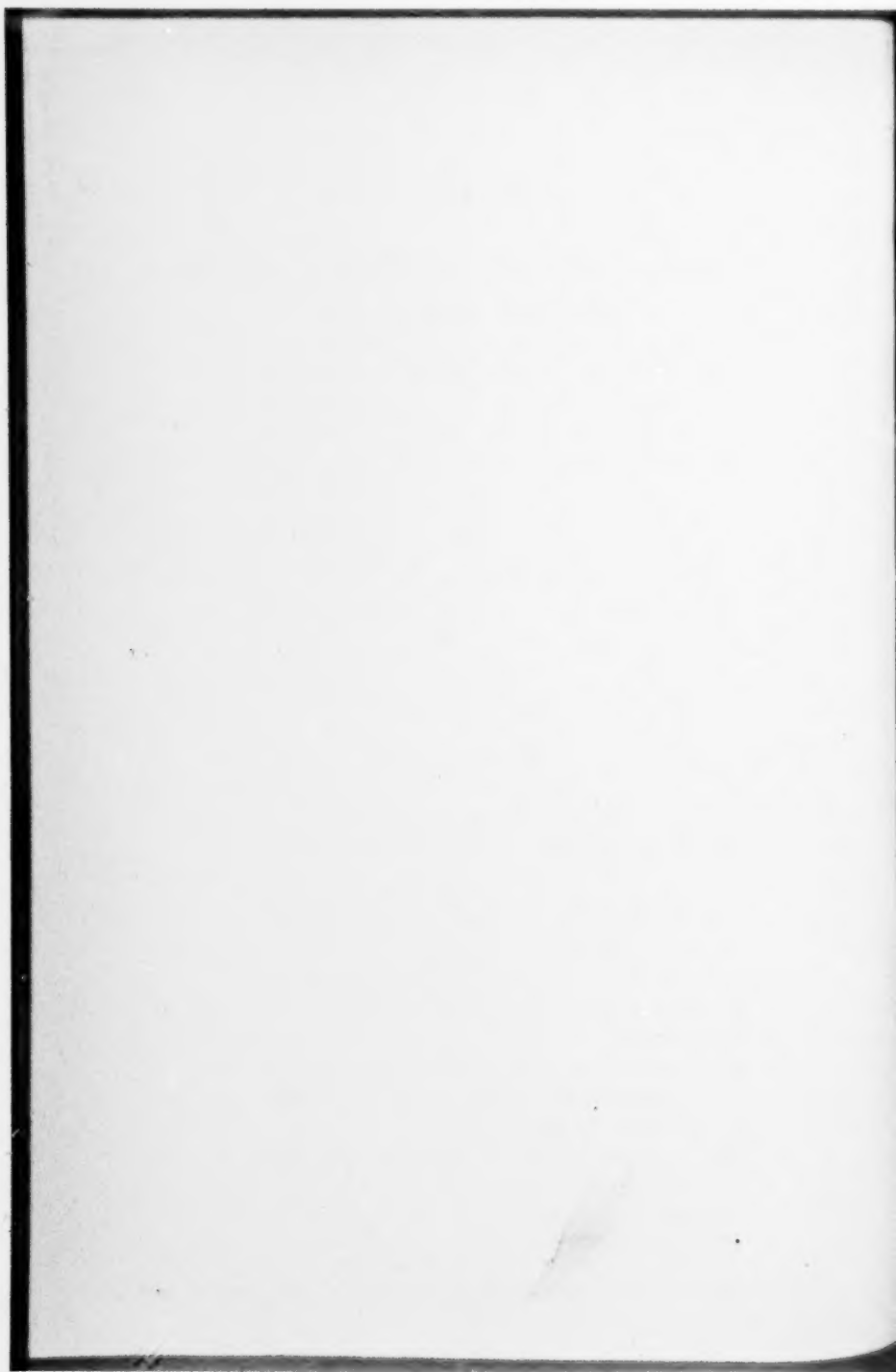
RAILROAD COMMISSION OF LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF LOUISIANA.

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1 Supreme Court of the United States, October Term, 1919.

No. 386.

BROOKS-SCANLON COMPANY, Petitioner,

VS.

RAILROAD COMMISSION OF LOUISIANA, Defendant.

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

Now comes Brooks-Scanlon Company, petitioner, and the Railroad Commission of Louisiana, defendant, being all of the parties to this record, and move this Honorable Court as follows:

Movers suggest that in the preparation of the original transcript herein, the following documents which formed part of the record in the lower Court, were through inadvertence omitted, and, hence, were not printed in the printed record:

(a) Article I of the charter of the Brooks-Scanlon Lumber Company.

(b) The rule to show cause issued by the Railroad Commission of Louisiana to the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company on June 4, 1918.

(c) The affidavit of Geo. A. Keyes, General Manager of the Kentwood & Eastern Railway Company, dated July 20, 1918, together with the exhibit attached thereto.

(d) The formal authority to cancel tariffs issued by the Railroad Commission of Louisiana to the Kentwood & Eastern Railway Company under date February 21, 1918, being Authority No. 10906-R.

(e) The notice to attend the hearing of the proceedings No. 2778 of its docket, issued by the Railroad Commission of Louisiana, under date June 17, 1918.

(f) Annual report of the Kentwood & Eastern Railway Company to the Railroad Commission of the State of Louisiana for the year ending December 31, 1917.

2 That copies of said document initialled by counsel are appended hereto; that the inclusion of said documents in the record herein is necessary to the proper determination of this Court,

Wherefore, appearers move this Honorable Court for an order authorizing the inclusion of said documents in the record in this Honorable Court and their printing in due course.

BROOKS-SCANLON COMPANY,

By ROBT. R. REID,

J. BLANC MONROE,

*Attorneys.*

RAILROAD COMMISSION OF LOUISIANA,

By W. M. BARROW,

*Attorneys.*

3 Article I of the Charter of the Brooks-Scanlon Lumber Company.

Article I.

The general nature of its business shall be to manufacture, buy, sell and deal in timber, logs, lumber, building materials and other personal property; also to buy, own, lease, mortgage, sell, deal in and improve any real estate, wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the incorporation.

J. B. M.

4

Railroad Commission of Louisiana.

No. 2778.

To the Kentwood & Eastern Railway Company, through Mr. Geo. A. Keyes, General Manager, and to the Brooks-Scanlon Company, Greeting:

You are hereby commanded and required to appear before the Railroad Commission of Louisiana, in its office, in the Capitol, at Baton Rouge, Louisiana, at such time as may hereafter be fixed, and then and there,

To show cause, if any there be, why you, and each of you, shall not be required to forfeit and pay to the Treasurer of the State of Louisiana the sum of not less than One Hundred (\$100.00) Dollars, nor more than Five Thousand (\$5,000.00) Dollars; for discontinuing the operation of the narrow gauge railroad of the Kentwood & Eastern Railway Company between Hackley, Louisiana, and Kentwood, Louisiana, in violation of the Rules and Regulations of the Railroad Commission of Louisiana; and to further show cause, if any there be, why freight and passenger service shall not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or The Brooks-Scanlon Company, or their successors, agents or assignees, in accordance with appropriate orders to be handed down and entered by the Railroad Commission of Louisiana, after a full and complete investigation; and for such

other or further interlocutory or final orders as may appear to the Commission to be necessary to protect the interests of the public.

By order of the Commission.

Baton Rouge, Louisiana, June 4, 1918.

[Seal Railroad Commission of Louisiana.]

(Signed)

HY. JASTREMSKI,  
*Secretary.*

J. B. M.

5 STATE OF LOUISIANA,  
*Parish of Tangipahoa, ss:*

Geo. A. Keyes, being duly sworn, deposes and says that he is General Manager of the Kentwood and Eastern Railway Company; that the accompanying statement showing gross income of \$391.51 and total expenses of \$1836.24 is approximately correct and as near so as can be determined at this time; further declares that of the receipts shown for freight, the total accruing for Mt. Hermon on business both in and out amounted to: .....

	\$3.46
Sunny Hill—Merchandise .....	.50
Murdock — “ .....	1.50
Morgan — “ .....	.50
Sunny Hill—2 cars potatoes .....	90.49
Hackley—4 cars lumber—McLain and Bickham .....	181.99
“ —2 “ Cross Ties—McLain and Bickham .....	63.11
Total .....	<u>341.55</u>

That McLain and Bickham advised some ten days ago that their timber was exhausted, their mill shut down and their lumber has all been shipped.

Affiant further states that the charges for Maintenance of Way and Structure show much less than the normal amount as there was no expense for renewal of cross ties, labor and material for bridges, etc.; that section labor was also reduced to a minimum and much less than is normally required if operations are to be continued.

Affiant further states the charge for Maintenance of Equipment is also below normal and includes only the expense of light running repairs and depreciation.

GEO. A. KEYES.

Sworn to and subscribed before me at Kentwood, Louisiana, this 20th day of July, 1918.

[Seal A. C. Stewart, Notary Public, Parish of Tangipahoa,  
State of Louisiana.]

A. C. STEWART,  
*Notary Public.*

Railroad Commission of Louisiana. Received Jul. 22, 1918.  
 ———, Secretary.

J. B. M.

6 Kentwood and Eastern Railway Company.

*Statement of Operations of the Kentwood and Eastern Railroad Between Kentwood and Hackley from July 1st to 19th, 1918, Inclusive, Trains Operated Bi-weekly as Per Agreement.*

Operating Revenues:	
Freight—Logs .....	\$ .00
“ —Other .....	341.55
Passenger .....	40.51
Other .....	9.45
	<hr/>
Gross Income .....	391.51
Operating Expenses:	
Maint. of W. & S. ....	290.50
“ “ Equip. ....	233.08
Traffic .....	47.52
Transportation .....	447.42
General .....	160.45
	<hr/>
Total .....	1178.97
Other Expenses:	
Taxes .....	146.55
Rentals .....	510.72
	<hr/>
Total Exp. ....	1836.24
Net Deficit .....	\$1444.73

J. B. M.

7 Railroad Commission of Louisiana.

This authority is subject to all the rules and regulations of the Commission.

When there are two or more lines operating between the points named herein, competing line will use this authority to meet the rate.

Shelby Taylor, Chairman, Baton Rouge, La.  
 B. A. Bridges, Homer, La.  
 John T. Michel, New Orleans, La.  
 Henry Jastremski, Sec'y, Baton Rouge, La.

Baton Rouge, February 21, 1918.

Authority No. 10906-R.

Classes & Commodities. Between Points on K. & E. Railway.

Upon the application of the Kentwood & Eastern Railway Company, dated February 4, 1918, file 218, on account of the discontinuance of the line of railway between Kentwood and Hackley, Louisiana, authority is hereby granted for the cancellation of all local and joint intrastate rates to and from points on the Kentwood & Eastern Railway between Kentwood, Louisiana, and Hackley, Louisiana, effective April 22, 1918.

By order of the Commission.

(Signed)

HENRY JASTREMSKI,

*Secretary.*

J. B. M.

8

Railroad Commission of Louisiana.

*Notice of Hearing.*

Notice is hereby given, that the following case has been assigned for hearing before the Railroad Commission of Louisiana, at its office in the Capitol Building, in Baton Rouge, at 10:00 A. M., on June 25, 1918, and all interested parties are requested to be present, or they may be represented by an attorney-at-law or in fact.

Written arguments or affidavits in support of complaint or answer may be filed with the Secretary of the Commission, at Baton Rouge, Louisiana, any time prior to or on the date of the hearing.

No. 2778.

RAILROAD COMMISSION OF LOUISIANA

versus

KENTWOOD & EASTERN RAILWAY COMPANY and BROOKS-SCANLON COMPANY.

In the Matter of Petition for —.

Please acknowledge receipt.

By order of the Commission.

Baton Rouge, Louisiana, June 17, 1918.

— — —, *Secretary.*

E. W. Ott, Mount Hermon, La.

G. M. Tate, Mount Hermon, La.

J. E. Brock, Mount Hermon, La.

J. B. M.

## 9 Railroad Commission of Louisiana, Baton Rouge.

Shelby Taylor, Chairman, Crowley, La.

John T. Michel, New Orleans, La.

Huey P. Long, Shreveport, La.

W. M. Barrow, Counsel, Baton Rouge, La.

Henry Jastremski, Secretary, Baton Rouge.

In reply please refer to our file No. —.

I, Henry Jastremski, Secretary of the Railroad Commission of Louisiana, do hereby certify that the hereto attached is a true and correct copy of the Annual Report of the Kentwood and Eastern Railway Company, to the Railroad Commission of Louisiana, for the year ended December 31, 1919; the original of which being on file and of record in the office of the Commission at Baton Rouge, Louisiana.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the Commission this the 18th day of December, 1919.

[Seal Railroad Commission of Louisiana.]

HENRY JASTREMSKI,  
*Secretary.*

“F”—W. M. B.

(Here follows reproduction of Annual Report of the Kentwood and Eastern Railway Co. marked pages 10 to 31 incl.)

COPY

ANNUAL REPORT

RAILROAD COMMISSION OF LA.  
RECEIVED  
JUL 15 1918

OF

..... SECRETARY.

*Kentwood & Eastern Railway Company*

TO THE

RAILROAD COMMISSION

OF THE

STATE OF LOUISIANA

FOR THE YEAR ENDED DECEMBER 31, 1917

COPY

*"F. W. W. W."*

10



FORM FOR STEAM RAILWAYS HAVING OPERATING REVENUES BELOW \$100,000 PER ANNUM.

# NOTICE.

1. This Form for annual report should be filled out in duplicate and one copy returned to the office of the Railroad Commission, Baton Rouge, Louisiana, by ..... in accordance with the requirements of the statutes of the State and regulations of the Commission made in pursuance thereof.
2. The instructions in this Form should be carefully observed, and each question should be answered *fully and accurately*, whether it has been answered in a previous annual report or not. Except in cases where they are specifically authorized, cancellations, arbitrary check marks, and the like should not be used either as partial or as entire answers to inquiries. If any inquiry, based on a preceding inquiry in the present report form, is, because of the answer rendered to such preceding inquiry, inapplicable to the person or corporation in whose behalf the report is made, such notation as "Not applicable, see page —, schedule (or line) number —" should be used in answer thereto, giving *precise reference* to the *portion of the report showing the facts which make the inquiry inapplicable*. Where the word "None" truly and completely states the fact, it should be given as the answer to any particular inquiry of any particular portion of an inquiry. Where data are called for, the month and day should be stated as well as the year. Customary abbreviations may be used in stating dates.
3. *Every annual report should, in all particulars, be complete in itself, and reference to the returns of former years should not be made to take the place of required entries except as herein otherwise specifically directed or authorized.*
4. If it be necessary or desirable to insert additional statements, typewritten or other, in a report, they should be legibly made on durable paper and, wherever practicable, on sheets not larger than a page of the Form. *Inserted sheets should be securely attached, preferably at the inner margin; attachment by pins or clips is insufficient.*
5. All entries should be made in a permanent record ink. Those of a contrary and unusual character should be made in red ink or other ink different in color from that used for ordinary entries.
6. Each respondent should make its annual report to this Commission in duplicate, retaining one copy in its files for reference in case correspondence with regard to such report, becomes necessary. For this reason two copies of the Form are sent to each corporation concerned.
7. Provision is made in this Form for the reports of Class III companies, that is, companies having annual operating revenues below \$100,000.
8. Except where the context clearly indicates some other meaning, the following terms when used in this Form have the meanings below stated:  
STATE and COMMISSION mean, respectively, *the State and the Commission* named in the first paragraph of this Notice. RESPONDENT means the person or corporation in whose behalf the report is made. THE YEAR means the year ended December 31, 1916. THE CLOSE OF THE YEAR means the close of business on December 31, 1916; or, in case the report is made for a shorter period than one year, it means the close of the period covered by the report. THE BEGINNING OF THE YEAR means the beginning of business on January 1, 1916; or, in case the report is made for a shorter period than one year, it means the beginning of the period covered by the report. THE PRECEDING YEAR means the year ended December 31, 1915. THE UNION SYSTEM OF ACCOUNTS FOR STEAM RAILWAY CORPORATIONS means the system of accounts for steam railway corporations embodied in the various classifications prescribed by the Interstate Commerce Commission, effective on July 1, 1907, and all amendments and revisions thereof and supplements and additions thereto prescribed by that Commission.
9. If the road operated by a respondent lies wholly within a single State, figures for "Entire line" need not be repeated in the columns "State" on pages 7, 9, 10, and 17, provided the fact is stated therein.

COPY  
ANNUAL REPORT

OF

*Kentwood and Eastern Railway Company*

TO THE

RAILROAD COMMISSION

OF THE

STATE OF LOUISIANA

FOR THE YEAR ENDED DECEMBER 31, 1917.

COPY

12

Name of Officer in charge of correspondence }  
with the Commission regarding this report, }

*Geo. A. Heyes*

Official title, *Genl. Manager*; Office address, *Kentwood, La.*

[illegible]

## IDENTITY OF RESPONDENT.

801. Give the exact name\* by which the respondent was known in law at the close of the year.  
*Kentwood and Eastern Railway Company*
802. State whether or not the respondent made an annual report to the Commission for the preceding year, or for any part thereof. If so, what name was such report made?  
*Yes - same name*
803. If any change was made in the name of the respondent during the year, state all such changes and the dates on which they were made.  
*None*
804. Give the location (including street and number) of the main business office of the respondent at the close of the year.  
*Kentwood, La.*
805. Give the titles, names, and office addresses of all general officers of the respondent at the close of the year, and the date when each person entered upon the discharge of the duties of his office. If there are receivers who are recognized as in the controlling management of the road, give also their names and titles, the location of their offices, and the date of their appointment.

Line No.	Title of General Officer. (a)	Name and office address of person holding office at close of year. (b)	Date of entry upon office. (c)
1	President,	<i>D. F. Brown</i>	<i>March 13-1917</i>
2	Vice President,	<i>H. E. Epperson</i>	"
3	Secretary,	<i>Edward Brown</i>	"
4	Treasurer,	<i>Edward Brown</i>	"
5	Comptroller Auditor,	<i>H. F. Brown</i>	"
6	Attorney or General Counsel,	<i>Geo. A. Hoyer</i>	"
7	General Manager,	"	"
8	General Superintendent,	"	"
9	General Freight Agent,	"	"
10	General Passenger Agent,	"	"
11	General Land Agent,	"	"
12	Chief Engineer,	"	"
13			

806. Give the names and office addresses of the several directors of the respondent at the close of the year, and the dates of expiration of their respective terms.

Line No.	Names of Directors. (a)	Office address. (b)	Term expires. (c)
17	<i>D. F. Brown</i>	<i>Minneapolis, Minn.</i>	<i>March 12-1918</i>
18	<i>H. E. Epperson</i>	"	"
19	<i>Edward Brown</i>	<i>Kentwood, La.</i>	"
20	<i>Geo. A. Hoyer</i>	"	"
21	<i>H. F. Brown</i>	"	"
22	<i>A. L. Stewart</i>	"	"
23			
24			
25			
26			

807. Give the date of incorporation of the respondent. *Dec. 5, 1905* 808. State the character of motive power used. *Steam*

809. Under the laws of what Government, State, or Territory was the respondent organized? If more than one, name all. Give reference to each statute and all amendments thereof. *Section 683 of the Revised Statutes of Louisiana, as amended by Act No. 154 of the General Assembly of 1902.*

810. State whether or not any corporation or group of corporations had, at any time during the year, the right to name the major part of the board of directors, managers, or trustees of the respondent; and if so, give the names of all such corporations and state whether such right was derived through (a) title to capital stock or other securities issued or assumed by the respondent, (b) claims for advances of funds made for the construction of the road and equipment of the respondent, or (c) express agreement or some other source.

*None*

811. Give hereunder a history of the respondent from its inception to date, showing all consolidations, mergers, reorganizations, etc., and if a consolidated or merging corporation give like particulars for all constituent and subconstituent corporations. Describe also the course of construction of the road of the respondent, and its financing.

*None*

\* Use the initial word the when (and only when) it is a part of the name, and distinguish between the words railroad and railway and between company and corporation.

Report for the Year ended December 31, 1917

400A. COMPARATIVE GENERAL BALANCE SHEET—ASSET SIDE.

For institutions covering this schedule, see the text pertaining to General Balance Sheet Accounts in the Uniform System of Accounts for Steam Railway Corporations. The entries in the short column (b) should be deducted from those in column (a) in order to obtain corresponding entries for column (c). All credit entries hereunder should be in red ink.

Line No.	Balance at beginning of year.	ITEM.	Balance at close of year.			Not change during year. (Increase in black, decrease in red.)
			(a)	(b)	(c)	
1	• • • • •	INVESTMENTS.	• • • • •	• • • • •	• • • • •	• • • • •
2	• • • • •	(700) Investment in road and equipment, city, or other.	• • • • •	(b) Total book assets at close of year.	(b) Dependent's own assets included in (b).	• • • • •
3	444,324.30	(700) Improvements on leased railway property.	408,589.43		32,734.87	
4		(700) Sinking funds.	297,404.43		297,404.43	
5		(700) Deposits in lieu of mortgaged property held.				
6	• • • • •	(705) Miscellaneous physical property.	148,666.9		64,097.45	
7	• • • • •	(706) Investments in affiliated companies:	• • • • •		• • • • •	
8		(A) Stocks,				
9		(B) Bonds,				
10		(C) Notes,				
11		(D) Advances,				
12	• • • • •	(707) Other investments:	• • • • •		• • • • •	
13		(A) Stocks,				
14		(B) Bonds,	500,000		500,000.00	
15		(C) Notes,				
16		(D) Advances,				
17		(E) Miscellaneous,				
18	570,488.44	Total investments,	458,196.55		62,291.89	
19	• • • • •	CURRENT ASSETS.	• • • • •		• • • • •	
20	722,877	(708) Cash.	406,837		316,500	
21		(709) Demand loans and deposits,				
22		(710) Time drafts and deposits,				
23		(711) Special deposits,				
24		(712) Loans and bills receivable,				
25	476,35	(713) Traffic and car-service balances receivable,	185,583		137,948	
26	70,397	(714) Net balance receivable from agents and conductors,	62,745.4		5,570.87	
27	147,764	(715) Miscellaneous accounts receivable,	87,812.34		85,834.70	
28	206,212.3	(716) Material and supplies,	35,186.31		145,150.8	
29		(717) Interest and dividends receivable,				
30		(718) Rents receivable,				
31		(719) Other current assets,				
32	24,002.06	Total current assets,	130,985.39		106,983.39	
33	• • • • •	DEFERRED ASSETS.	• • • • •		• • • • •	
34	• • • • •	(720) Working fund advances,				
35	• • • • •	(721) Insurance and other funds,				
36		(722) Other deferred assets,				
37		Total deferred assets,				
38	• • • • •	UNADJUSTED DEBITS.	• • • • •		• • • • •	
39	• • • • •	(723) Rents and insurance premiums paid in advance,	138.60		138.60	
40		(724) Discount on capital stock,				
41		(725) Discount on funded debt,				
42		(726) Property abandoned chargeable to operating expenses,				
43		(727) Other unadjusted debits,	37,149.1		37,149.1	
44	• • • • •	(728) Securities issued or assumed—Unpledged,	• • • • •		• • • • •	
45	• • • • •	(729) Securities issued or assumed—Pledged,	38,535.1		38,535.1	
46		Total unadjusted debits,	59,303.545		48,549.5	
47	544,490.50	GRAND TOTAL,	593,035.45		485,449.5	



Report for the Year ended December 31, 1908/9/7.

400L. COMPARATIVE GENERAL BALANCE SHEET—LIABILITY SIDE.

For instructions covering this schedule, see the text pertaining to General Balance Sheet Accounts in the Uniform System of Accounts for Steam Railway Corporations. The entries in the short column (b) should be deducted from those in column (a) in order to obtain corresponding entries for column (c). All debit entries hereunder should be in red ink.

Line No.	Balance at beginning of year.			ITEM. (b)	Balance at close of year.			Net change during year. (Increase in black, decrease in red.) (d)
	a.	b.	c.		a.	b.	c.	
1	.	.	.	(757) Capital stock,	.	.	.	.
2	.	.	.		.	.	.	.
3	1 000 000 00	.	.		1 000 000 00	.	.	.
4	.	.	.	(758) Stock liability for conversion,	.	.	.	.
5	.	.	.	(759) Premium on capital stock,	.	.	.	.
6	1 000 000 00	.	.	Total Stock,	1 000 000 00	.	.	.
7	.	.	.	GOVERNMENTAL GRANTS.	.	.	.	.
8	.	.	.		.	.	.	.
9	.	.	.		.	.	.	.
10	.	.	.	(754) Grants in aid of construction,	.	.	.	.
11	.	.	.	LONG-TERM DEBT.	.	.	.	.
12	.	.	.	(b) Total book liability	.	.	.	.
13	.	.	.	(b) Portion held by or	.	.	.	.
14	.	.	.	for respondent at close of	.	.	.	.
15	.	.	.	year.	.	.	.	.
16	.	.	.	(b) Total book liability	.	.	.	.
17	.	.	.	(b) Portion held by or	.	.	.	.
18	.	.	.	for respondent at close of	.	.	.	.
19	6 706 4	.	.	year.	1 18 456	.	.	5 13 92
20	22 23 34	.	.	(755) Funded debt unmatured,	975 975	.	.	753 641
21	.	.	.	(756) Receiver's certificates,	.	.	.	.
22	.	.	.	(757) Nonnegotiable debt to affiliated com-	.	.	.	.
23	.	.	.	(A) Notes,	.	.	.	.
24	.	.	.	(B) Open accounts,	.	.	.	.
25	.	.	.	Total long-term debt,	.	.	.	.
26	.	.	.	CURRENT LIABILITIES.	.	.	.	.
27	.	.	.	(758) Loans and bills payable,	.	.	.	.
28	.	.	.	(759) Traffic and cur-service balances payable,	.	.	.	.
29	6 706 4	.	.	(760) Audited accounts and wages payable,	1 18 456	.	.	5 13 92
30	22 23 34	.	.	(761) Miscellaneous accounts payable,	975 975	.	.	753 641
31	.	.	.	(762) Interest matured unpaid,	.	.	.	.
32	.	.	.	(763) Dividends matured unpaid,	.	.	.	.
33	.	.	.	(764) Funded debt matured unpaid,	.	.	.	.
34	.	.	.	(765) Unmatured dividends declared,	.	.	.	.
35	.	.	.	(766) Unmatured interest accrued,	.	.	.	.
36	.	.	.	(767) Unmatured rents accrued,	.	.	.	.
37	7 465 09	.	.	(768) Other current liabilities,	529 26	.	.	693 583
38	103 5907	.	.	Total current liabilities,	114 735 2	.	.	11 450
39	.	.	.	DEFERRED LIABILITIES.	.	.	.	.
40	.	.	.	(769) Liability for provident funds,	232 00	.	.	600
41	23 600	.	.	(770) Other deferred liabilities,	232 00	.	.	600
42	22 600	.	.	Total deferred liabilities,	192 50	.	.	192 50
43	.	.	.	UNADJUSTED CREDITS.	.	.	.	.
44	.	.	.	(771) Tax liability,	.	.	.	.
45	.	.	.	(772) Premium on funded debt,	.	.	.	.
46	.	.	.	(773) Insurance and casualty reserves,	.	.	.	.
47	.	.	.	(774) Operating reserves,	.	.	.	.
48	.	.	.	(775) Accrued depreciation—Road,	669 693 9	.	.	826 02
49	661 4337	.	.	(776) Accrued depreciation—Equipment,	2718 2	.	.	936 20
50	.	.	.	(777) Accrued depreciation—Miscellaneous physical property,	6743 578	.	.	823 2
51	120 809	.	.	(778) Other unadjusted credits,	367 442 46	.	.	888 49
52	473 5146	.	.	Total unadjusted credits,	.	.	.	.
53	366 5397	.	.	CORPORATE SURPLUS.	.	.	.	.
54	.	.	.	(779) Additions to property through income and surplus,	.	.	.	.
55	.	.	.	(780) Funded debt retired through income and surplus,	.	.	.	.
56	.	.	.	(781) Sinking fund reserves,	.	.	.	.
57	.	.	.	(782) Miscellaneous fund reserves,	.	.	.	.
58	.	.	.	(783) Appropriated surplus not specifically invested,	.	.	.	.
59	366 5397	.	.	Total appropriated surplus,	367 442 46	.	.	464 5364
60	.	.	.	(784) Profit and loss + Credit,	413 896 10	.	.	479 4213
61	366 5397	.	.	Total corporate surplus, †	59303545	.	.	4854495
62	544 9050	.	.	GRAND TOTAL,	.	.	.	.
63	.	.	.		.	.	.	.

16

† Insert "Debit" or "Credit," as may be appropriate.

‡ Deficit, if in red.

# 670. UNMATURED FUNDED DEBT.

Give the particulars called for concerning the several unmatured funded debt liabilities of the respondent outstanding at the close of the year. Funded debt, as here used, comprises all obligations maturing later than one year after date of issue in accordance with the instructions in the Uniform System of Accounts for Steam Railway Corporations. Show each issue separately, and make all necessary explanations in footnotes. For the purposes of this report, securities are considered to be *actually issued* when sold to a bona fide purchaser for a valuable consideration, and such purchaser holds free from control by the respondent. All securities actually issued and not reacquired by or for the respondent are considered to be *actually outstanding*.

Line No.	NAME AND CHARACTER OF OBLIGATION. (a)	Par value of extent of indebtedness authorized. <sup>†</sup> (b)	Nominal date of issue. (c)	Date of maturity. (d)	INTEREST PROVISIONS.		Par value of actual issue. <sup>‡</sup> (g)	Cash realized on actual issue. (h)	Par value of amount held by or for respondent. (i)	Actually outstanding at close of year. (j)	INTEREST DURING YEAR.	
					Rate per cent per annum. (e)	Dates due. (f)					Accrued. (k)	Actually paid. (l)
1												
2												
3												
4												
5												
6	Total,											

none

Purpose for which issue was authorized,<sup>†</sup>

# 680. CAPITAL STOCKS.

Give the particulars called for concerning the several classes and issues of capital stocks of the respondent outstanding at the close of the year, and make all necessary explanations in footnotes. For definition of securities *actually issued* and *actually outstanding* see instructions for schedule 670.

Line No.	Class of stock (a)	Date issue was authorized. <sup>‡</sup> (b)	TOTAL NUMBER OF SHARES.		Par value per share. (e)	Par value of actual issue. <sup>‡</sup> (f)	Cash realized on actual issue. (g)	Par value of amount held by or for respondent. (h)	Actually outstanding at close of year. (i)	DIVIDENDS DURING YEAR.		
			Authorized. <sup>‡</sup> (c)	Issued to close of year. <sup>‡</sup> (d)						DECLARED.	Amount actually paid.	
										Rate. (j)	Amount. (k)	Amount actually paid. (l)
12	Common		1000	1000	\$ 100	\$ 100000	\$ 100000	none	100000			
13												
14												
15												
16	Total,		1000	1000		100000	100000		100000			

Amount of receipts outstanding at the close of the year for installments received on subscriptions for stocks:

none

Purpose for which issue was authorized,<sup>†</sup>

The total number of stockholders at the close of the year was 6

Report for the Year ended December 31, 1917

<sup>†</sup> By the State Board of Railroad Commissioners, or other public authority, if any, having control over the issue of securities; if no public authority has such control, state the purpose and amounts as authorized by the Board of Directors and approved by stockholders.

<sup>‡</sup> If any shares of stock have been retired or any funded debt has been paid or reacquired after actual issue to a bona fide purchaser for value, show the particulars in a footnote.

Give particulars of changes in accounts for investment in road and equipment, classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. Credit items in the entries should be fully explained.

**Give particulars of changes in accounts for investment.**  
**Credit items in the entries should be fully explained.**

Account.		Total Expenditures During the Year.		Account.		Total Expenditures During the Year.	
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
Entire line.	State.	Entire line.	State.	Entire line.	State.	Entire line.	State.
(1) Engineering.				(19) Assessments for public improvements.			
(2) Land for transportation purposes.				(40) Revenues and operating expenses during construction.			
(3) Grading.				(41) Cost of road purchased.			
(4) Underground power tube.				(42) Reconstruction of road purchased.			
(5) Tunnels and subways.				(43) Other expenditures—Road.			
(6) Bridges, trestles, and culverts.				(44) Shop machinery.			
(7) Elevated structures.				(45) Power plant machinery.			
(8) Ties.				(46) Power substation apparatus.			
(9) Rails.				(47) Unapplied construction material and supplies.			
(10) Other track material.				(48) Total expenditures for road.			
(11) Ballast.				(51) Steam locomotives.			
(12) Track laying and surfacing.				(52) Other locomotives.			
(13) Right-of-way fences.				(53) Freight-train cars.			
(14) Snow and sand fences and snow sheds.				(54) Passenger-train cars.			
(15) Crossings and signs.				(55) Motor equipment of cars.			
(16) Station and office buildings.				(56) Hoisting equipment.			
(17) Roadway buildings.				(57) Work equipment.			
(18) Water stations.				(58) Miscellaneous equipment.			
(19) Fuel stations.				(59) Total expenditures for equipment.			
(20) Shops and engine houses.				(60) Organization expenses.			
(21) Grain elevators.				(70) General officers and clerks.			
(22) Storage warehouses.				(73) Law.			
(23) Wharves and docks.				(74) Stationery and printing.			
(24) Coal and ore wharves.				(75) Taxes.			
(25) Gas producing plants.				(76) Interest during construction.			
(26) Telegraph and telephone lines.				(77) Other expenditures—General.			
(27) Signals and interlockers.				(78) Total general expenditures.			
(28) Power dams, canals, and pipe lines.				(79) Grand total for the year.			
(29) Power plant buildings.				(80) Investment July 1, 1914, to close of preceding year.			
(30) Power substation buildings.				(81) Total investment since June 30, 1914.			
(31) Power transmission systems.							
(32) Power distribution systems.							
(33) Power line poles and fixtures.							
(34) Underground conduits.							
(35) Miscellaneous structures.							
(36) Paving.							
(37) Roadway machines.							
(38) Roadway small tools.							

• See paragraph 9 of "Notice" on inside of cover.



## 801. INCOME ACCOUNT FOR THE YEAR.

Give the Income Account of the respondent for the year in accordance with the rules prescribed in the Uniform System of Accounts for Steam Railway Corporations.

Line No.	Task. (a)	Amount applicable to the year. (b)	Remarks. (c)
1	I. OPERATING INCOME.		
2	(501) * Railway operating revenues (p. 9).	181,278.69	
3	(531) * Railway operating expenses (p. 10),	121,115.82	
4	* Net revenue † from railway operations,	60,162.87	
5	(532) * Railway tax accruals,	593.56	
6	(533) * Uncollectible railway revenues,	542.27	
7	* Railway operating income, †	542.27	
8	(502) Revenues from miscellaneous operations (p. 12),		
9	(534) Expenses of miscellaneous operations (p. 12),		
10	Net revenue † from miscellaneous operations (p. 12),		
11	(535) Taxes on miscellaneous operating property,		
12	Miscellaneous operating income, †	542.27	
13	Total operating income, †	542.27	
14	II. NONOPERATING INCOME.		
15	(503) Hire of freight cars—Credit balance,	1822.22	
16	(504) Rent from locomotives,	280.00	
17	(505) Rent from passenger-train cars,		
18	(506) Rent from floating equipment,	1280.00	
19	(507) Rent from work equipment,		
20	(508) Joint facility rent income,	335.00	
21	(509) Income from lease of road (p. 13),		
22	(510) Miscellaneous rent income (p. 11),	3635.43	
23	(511) Miscellaneous nonoperating physical property (p. 12),		
24	(512) Separately operated properties—Profit,		
25	(513) Dividend income,		
26	(514) Income from funded securities,	1370.44	
27	(515) Income from unfunded securities and accounts,		
28	(516) Income from sinking and other reserve funds,		
29	(517) Release of premiums on funded debt,		
30	(518) Contributions from other companies (p. 13),		
31	(519) Miscellaneous income (p. 11),	2571.04	
32	Total nonoperating income, †	61798.82	
33	Gross income, †		
34	III. DEDUCTIONS FROM GROSS INCOME.		
35	(536) Hire of freight cars—Debit balance,		
36	(537) Rent for locomotives,		
37	(538) Rent for passenger-train cars,		
38	(539) Rent for floating equipment,		
39	(540) Rent for work equipment,	5231.00	
40	(541) Joint facility rents,	10440.44	
41	(542) Rent for leased made (p. 13),	5376	
42	(543) Miscellaneous rents (p. 11),		
43	(544) Miscellaneous tax accruals,		
44	(545) Separately operated properties—Loss,		
45	(546) Interest on funded debt,		
46	(547) Interest on unfunded debt,	17008	
47	(548) Amortization of discount on funded debt,		
48	(549) Maintenance of investment organization,		
49	(550) Income transferred to other companies (p. 13),		
50	(551) Miscellaneous income charges (p. 11),		
51	Total deductions from gross income,	158952.8	
52	Net income, †	45903.65	
53	IV. DISPOSITION OF NET INCOME.		
54	(552) Dividend appropriations of income,		
55	(553) Income applied to sinking and other reserve funds,	8884.9	
56	(554) Income appropriated for investment in physical property,		
57	(555) Stock discount extinguished through income,	8884.9	
58	(556) Miscellaneous appropriations of income,		
59	Total appropriations of income,	45903.65	
60	Income † balance transferred to Profit and Loss.		

\* Includes operation of water lines, if any.

† Deduct, if in profit.

## 901. PROFIT AND LOSS ACCOUNT.

Show hereunder the items of the Profit and Loss Account of the respondent for the year, classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. The sum of the dividends stated in this account and those stated in the Income Account (p. 8) should equal the total amount of dividends declared during the year as shown in schedule No. 600 (p. 6, col. (k)).

Line No.	Item. (a)	Debit. (b)	Credit. (c)	Balance. (d)
1	* balance at beginning of year (p. 5),			
2	Credit balance transferred from Income (p. 8),			
3	(603) Profit on road and equipment sold,		450,571.6	
4	(604) Delayed income credits,†		156,917	
5	(605) Unrefundable overcharges,			
6	(606) Donations,			
7	(607) Miscellaneous credits,†			
8	Debit balance transferred from Income (p. 8),			
9	(613) Surplus applied to sinking and other reserve funds,			
10	(614) Dividend appropriations of surplus			
11	(615) Surplus appropriated for investment in physical property.			
12	(616) Stock discount extinguished through surplus,			
13	(617) Debt discount extinguished through surplus,			
14	(618) Miscellaneous appropriations of surplus,			
15	(619) Loss on retired road and equipment.	136,876		
16	(620) Delayed income debits,†			
17	(621) Miscellaneous debits,†	617		
18	* balance carried to Balance Sheet,	46,594.35		
19	TOTAL.	46,594.35	46,594.35	

## 902. RAILWAY OPERATING REVENUES.

State the railway operating revenues of the respondent for the year, classified in accordance with the Uniform System of Accounts for Steam Railway Corporations. The proportion of joint traffic receipts belonging to other carriers should not be included.

Line No.	CLASS OF RAILWAY OPERATING REVENUES. (a)	AMOUNT OF REVENUE FOR THE YEAR.		CLASS OF RAILWAY OPERATING REVENUES. (d)		AMOUNT OF REVENUE FOR THE YEAR.	
		Entire line. (b)	Share.† (c)			Entire line. (e)	Share.† (f)
1	(101) Freight,	162,353.15		(131) Dining and buffet,			
2	(102) Passenger,	617,543		(132) Hotel and restaurant,			
3	(103) Excess baggage,	251.6		(133) Station, train, and boat privileges,			
4	(104) Sleeping car,			(134) Parcel room,			
5	(105) Parlor and chair car,			(135) Storage—Freight,	377.6		
6	(106) Mail,	183.31		(136) Storage—Baggage,			
7	(107) Express,	578.36		(137) Demurrage,	145.00		
8	(108) Other passenger-train			(138) Telegraph and telephone,	997.64		
9	(109) Milk,	234.77		(139) Grain elevator,			
10	(110) Switching,	7628.00		(140) Stockyard,			
11	(111) Special service train,			(141) Power,			
12	(112) Other freight-train,			(142) Rents of buildings and other property,			
13	(113) Water transfers—Freight,			(143) Miscellaneous,	132.831		
14	(114) Water transfers—Passenger, stock,			Total incidental operating revenue,	250.871		
15	(115) Water transfers—Vehicle and line			(151) Joint facility—Cr.,			
16	(116) Water transfers—Other, line,			(152) Joint facility—Dr., line,			
17	Total rail-line transportation revenue,	178769.98		Total joint facility operating revenue,			
18	(121) Freight,			TOTAL RAILWAY OPERATING	181278.67		
19	(122) Passenger,						
20	(123) Excess baggage,						
21	(124) Other passenger service,						
22	(125) Mail,						
23	(126) Express,						
24	(127) Special service,						
25	(128) Other,						
26	Total water-line transportation revenue,						

\* Insert "Debit" or "Credit," as may be appropriate.

† Show principal items in detail.

‡ See paragraph 9 of "Notes" on inside of cover.

## 1001. RAILWAY OPERATING EXPENSES.

[FOR COMPANIES HAVING ANNUAL OPERATING REVENUES BELOW \$100,000.]

State the railway operating expenses of the respondent for the year, classifying them in accordance with the Uniform System of Accounts for Steam Railway Corporations.

Line No.	NAME OF RAILWAY OPERATING EXPENSE ACCOUNT. (a)	AMOUNT OF OPERATING EXPENSES FOR THE YEAR.						NAME OF RAILWAY OPERATING EXPENSE ACCOUNT. (d)	AMOUNT OF OPERATING EXPENSES FOR THE YEAR.					
		Entire line. (b)			State.* (c)				Entire line. (e)			State.* (f)		
1	I. MAINTENANCE OF WAY AND STRUCTURES.							(2249) Fuel for train locomotives,						
2	(2201) Superintendence,							(2250) Other train expenses,						
3	(2202) Road maintenance,							(2251) Injuries to persons,						
4	(2203) Maintaining buildings, etc.,							(2252) Loss and damage,						
5	(2204) Depreciation of way and structures,							(2253) Other casualty expenses,						
6	(2205) Miscellaneous expenses,							(2254) Other rail transportation expenses,						
7	(2206) Maintaining joint way and structures—Dr.,							(2255) Operating joint tracks and facilities—Dr.,						
8	(2207) Maintaining joint way and structures—Cr.,							(2256) Operating joint tracks and facilities—Cr.,						
9	Total maintenance of way and structures,							Total transportation—Rail Line,						
10	II. MAINTENANCE OF EQUIPMENT.							V. TRANSPORTATION—WATER LINE.						
11	(2221) Superintendence,							(2257) Transportation—Water Line,						
12	(2222) Repairs of machinery and other apparatus,							VI. MISCELLANEOUS OPERATIONS.						
13	(2223) Locomotive repairs,							(2258) Miscellaneous operations,						
14	(2224) Car repairs,							VII. GENERAL.						
15	(2225) Other equipment repairs,							(2261) Administration,						
16	(2226) Equipment depreciation and retirements,							(2262) Insurance—General,						
17	(2227) Miscellaneous equipment expenses,							(2263) Valuation expenses,						
18	(2228) Maintaining joint equipment at terminals—Dr.,							(2264) Other general expenses,						
19	(2229) Maintaining joint equipment at terminals—Cr.,							(2265) General joint facility expenses—Dr.,						
20	Total maintenance of equipment,							(2266) General joint facility expenses—Cr.,						
21	III. TRAFFIC.							Total general expenses,						
22	(2231) Traffic expenses,							RECAPITULATION.						
23	IV. TRANSPORTATION—RAIL LINE.							I. Maintenance of way and structures,						
24	(2241) Superintendence and dispatching,							II. Maintenance of equipment,						
25	(2242) Station service,							III. Traffic expenses,						
26	(2243) Yard employees,							IV. Transportation—Rail Line,						
27	(2244) Fuel for yard locomotives,							V. Transportation—Water Line,						
28	(2245) Miscellaneous yard expenses,							VI. Miscellaneous Operations,						
29	(2246) Operating joint yards and terminals—Dr.,							VII. General,						
30	(2247) Operating joint yards and terminals—Cr.,							VIII. Transportation for Investment—Cr.,						
31	(2248) Train employees,							Grand Total Railway Operating Expenses,						
32	Operating ratio (ratio of operating expenses to operating revenues), 66.81 per cent.													

Report for the Year ended December 31, 1917

## 1101. MISCELLANEOUS RENT INCOME.

Line No.	Description of Property.		Name of lessee. (c)	Amount of rent. (d)
	Name. (a)	Location. (b)		
1		None		
2				
3				
4				
5				
6				
7				
8				
9			Total,	

## 1102. MISCELLANEOUS INCOME.

Line No.	Source and character of receipt. (a)	Gross receipt. (b)	Expenses and other deductions. (c)	Net miscellaneous income. (d)
21	None			
22				
23				
24				
25				
26				
27				
28				
29		Total,		

## 1103. MISCELLANEOUS RENT DEDUCTIONS.

Line No.	Description of Property.		Name of lessor. (c)	Amount charged to Income. (d)
	Name. (a)	Location. (b)		
31		None		
32				
33				
34				
35				
36				
37				
38				
39			Total,	

## 1104. MISCELLANEOUS INCOME CHARGES.

Line No.	Description and purpose of deduction from gross income. (a)	Amount. (b)
41	None	
42		
43		
44		
45		
46		
47		
48		
49		22
50		Total,



1201. MISCELLANEOUS OPERATIONS.							1202. MISCELLANEOUS NONOPERATING PHYSICAL PROPERTY.						
Line No.	DESIGNATION. (a)	Revenues. (b)		Expenses. (c)		Net revenue or deficit. (d)	DESIGNATION. (e)	Revenues or income. (f)		Expenses. (g)		Net income or loss. (h)	Taxes. (i)
		\$	c.	\$	c.	\$		\$	c.	\$	c.	\$	c.
1	None						Drank material	3635	43			3635	43
2													
3													
4													
5													
6													
7	Total,						Total,	3635	43			3635	43

1203. MILEAGE OF ROAD OPERATED (ALL TRACKS).							1204. MILEAGE OF ROAD OPERATED—BY STATES—(SINGLE TRACK).							
Line No.	LINE IN USE. (a)	Owued. (b)	Proprietary companies. (c)	Leased. (d)	Operated under contract. (e)	Operated under track-age rights. (f)	Total operated. (g)	STATE. (h)	Owued. (i)	Proprietary companies. (j)	Leased. (k)	Operated under contract. (l)	Operated under track-age rights. (m)	Total operated. (n)
10	Single or first track,	1855		2982	2370	869	8076	Louisiana	1699		2982	2370	869	7920
11	Second track,							Minnesota	156					156
12	Third track,													
13	Yard track and sidings,	456		540	226	00	1222							
14	Total,	2311		3522	2596	869	9298	Total,	1855		2982	2370	869	8076

1215. Show, by States, single track mileage owned but not operated by respondent. *None*

1216. Road is projected to extend from\* *None* to\* . Total distance . miles.

1217. Road is completed from\* *None* to\* . Total distance . miles.

1218. Preliminary surveys were completed,†

1219. Location surveys were completed,†

1220. Total number of miles of right-of-way acquired to close of year , including miles acquired during year. —

1221. Total number of miles graded to close of year , including miles graded during year.

1222. Total number of miles of track laid to close of year , including miles laid during year.

1223. Gage of track, ft., in.

1224. Weight of rail lbs. per yard.

1225. Kind, size, and spacing of cross-ties.

1226. Character of ballast.

1230. SUMMARY STATEMENT OF TRACK MILEAGE WITHIN THE STATE AND OF TITLES THERETO AT CLOSE OF YEAR.‡

Line No.	(a)	LINE OPERATED BY RESPONDENT.												Line owned but not operated by respondent.	
		Class 1: Line owned.		Class 2: Line of proprietary companies.		Class 3: Line operated under lease.		Class 4: Line operated under contract.		Class 5: Line operated under trackage rights.		Total line operated.		Added during year. (n)	Total at end of year. (o)
		Added during year. (b)	Total at end of year. (c)	Added during year. (d)	Total at end of year. (e)	Added during year. (f)	Total at end of year. (g)	Added during year. (h)	Total at end of year. (i)	Added during year. (j)	Total at end of year. (k)	At beginning of year. (l)	At close of year. (m)		
51	Miles of road,		1699				2982		2370		869	7920	7920		
52	Miles of second track,														
53	Miles of third track,														
54	Miles of all other main tracks,														
55	Miles of sidings, etc., on main track,		214				296		173		00	683	683		
56	Miles of yard track,		214				244		53		00	511	511		
57	All tracks,	00	2127	00	00	00	3522	00	2596	00	869	9114	9114	00	00

\* Insert names of places.

† Insert dates.

‡ Entries in columns headed "Added during year" should show net increases.

**1301. RENTS RECEIVABLE.**  
**INCOME FROM LEASE OF ROAD.**

Line No.	Land leased. (a)	Location. (b)	Name of lessee. (c)	Amount of rent during year. (d)
1	Hunter Lpua	Centerville, Ia.	B. O. Bandera	33500
2				
3				
4				
5				
Total,				33500

**1302. RENTS PAYABLE.**  
**DEDUCTIONS FOR LEASE OF OTHER ROADS.**

Line No.	Land leased. (a)	Location. (b)	Name of lessee. (c)	Amount of rent during year. (d)
11	National & Eastern R.R.	Centerville to Hadley	Broad-Carlson Co.	100000
12	Yard tracks	Centerville, Ia.	B. O. R.R.	44000
13				
14				
15				
Total,				104400

**1303. CONTRIBUTIONS FROM OTHER COMPANIES.**

Line No.	Name of contributor. (a)	Amount during year. (b)	Name of transferee. (c)	Amount during year. (d)
1	None		None	
2				
3				
4				
5				
6				
Total,				

**1304. TRANSFER OF INCOME TO OTHER COMPANIES.**

Line No.	Name of contributor. (a)	Amount during year. (b)	Name of transferee. (c)	Amount during year. (d)
1	None		None	
2				
3				
4				
5				
6				
Total,				

**1305.** State whether the respondent had, at the close of the year, any investments of any character (outside of capital devoted to railway and miscellaneous operations), and if so, give a full description of such investments.

None

**1306.** Describe fully all liens upon any of the property of the respondent at the close of the year, and all mortgages, deeds of trust, and other instruments whereby such liens were created. Describe also all property subject to the said several liens. This inquiry covers judgment liens, mechanics' liens, etc., as well as liens based on contract. If there were no liens of any character upon any of the property of the respondent at the close of the year, state that fact.

None

24

# 1401. EMPLOYEES AND THEIR COMPENSATION.

## A. NUMBER OF EMPLOYEES, AMOUNT OF SERVICE RECEIVED, AND COMPENSATION PAID.

Give particulars of the number of employees of various classes in the service of the respondent at the times indicated hereunder, and of service rendered by various classes of employees during the year and compensation paid therefor. Employees are to be counted and classified and their service reported in accordance with the Com-

mission's Rules governing the Classification of Steam Railway Employees, as in effect during the year.

Pensioners rendering no service are not to be included in the count, nor is any compensation paid them to be included hereunder.

Averages called for in column (f) may be derived from the entries in the preceding columns (b) to (e), inclusive; if otherwise determined, explain the matter in a footnote.

Item No.	CLASS OF EMPLOYEES (a)	NUMBER OF EMPLOYEES IN SERVICE AT MIDDLE OF MONTH NAMED.				Average number of employees in service. (f)	Total number of hours on duty during year.			Total number of days on duty during year.		Total compensation during year.		REMARKS. (j)
		January. (b)	April. (c)	July. (d)	October. (e)		(g)			(h)		(i)		
1	General officers, \$3,000 p. a. and upwards,	1	1	1	1	1	..	..	..	313	3	300 00		
2	General officers, below \$3,000 per annum,	4	4	4	4	4	..	..	..	458	4	765 51		
3	Division officers, \$3,000 p. a. and upwards,	1	1	1	1	1	..	..	..	313	2	055 00		
4	Division officers, below \$3,000 per annum,	1	1	1	1	1	..	..	..	..	1	100 00		
5	Clerks, \$500 p. a. and upwards (except No. 37),	1	2	2	3	2	..	7	321	..	..	1	674 94	
6	Clerks, below \$500 p. a. (except No. 37),	1	1	1	1	1	..	..	..	..	310	8	32 83	
7	Messengers and attendants,	6	6	6	6	6	..	..	..	1816	3	985 62		
8	Assistant engineers and draftsmen,	1	1	1	1	1	..	..	..	..	..	..		
9	M.W.&S. foremen (excluding Nos. 10 and 18),	1	1	1	1	1	..	..	..	..	..	..		
10	Section foremen,	1	1	1	1	1	..	..	..	..	..	..		
11	General foremen—M. E. department,	3	3	4	4	3.5	..	9	958	..	..	4	476 24	
12	Gang and other foremen—M. E. department,	1	1	1	1	1	..	3	265	..	..	1	406 32	
13	Machinists,	1	1	1	1	1	..	2	254	..	..	1	061 16	
14	Boiler makers,	1	1	1	1	1	..	..	..	..	..	..		
15	Blacksmiths,	1	1	1	1	1	..	..	..	..	..	..		
16	Masons and bricklayers,	1	1	1	1	1	..	..	..	..	..	..		
17	Structural ironworkers,	1	1	1	1	1	..	..	..	..	..	..		
18	Carpenters,	1	1	1	1	1	..	..	..	..	..	..		
19	Painters and upholsterers,	1	1	1	1	1	..	..	..	..	..	..		
20	Electricians,	1	1	1	1	1	..	..	..	..	290	5	96 85	
21	Air-brake men,	14	12	13	13	13	..	39	240	..	..	8	459 26	
22	Car inspectors,	2	2	1	2	1.75	..	4	699	..	..	1	276 09	
23	Car repairers,	9	11	11	11	10.5	..	35	013	..	..	5	286 89	
24	Other skilled laborers,	27	28	29	28	28	..	87	94	..	..	11	730 05	
25	Mechanics' helpers and apprentices,	7	7	7	7	7	..	19	523	..	..	2	891 22	
26	Section men,	1	1	1	1	1	..	..	..	..	..	..		
27	Other unskilled laborers,	1	1	1	1	1	..	..	..	..	..	..		
28	Foremen of const. gangs and work trains,	1	1	1	1	1	..	..	..	..	..	..		
29	Other men in const. gangs and work trains,	1	1	1	1	1	..	..	..	..	..	..		
30	Traveling agents and solicitors,	1	1	1	1	1	..	..	..	..	..	..		
31	Employees in outside agencies,	1	1	1	1	1	..	..	..	..	..	..		
32	Other traffic employees,	1	1	1	1	1	..	..	..	..	..	..		
33	Train dispatchers and directors,	1	1	1	1	1	..	3	070	..	..	1	050 00	
34	Telegraphers, telephoners, and block operators,	1	1	1	1	1	..	..	..	..	..	..		
35	Telegraphers and telephoners operating interlockers,	1	1	1	1	1	..	..	..	..	..	..		
36	Levermen (nontelegraphers),	1	1	1	1	1	..	..	..	..	..	..		
37	Telegrapher-clerks,	1	1	1	1	1	..	..	..	..	..	..		
38	Agent-telegraphers,	4	4	4	4	4	..	12	280	..	..	2	321 00	
39	Station agents (nontelegraphers),	1	1	1	1	1	..	..	..	313	9	95 00		

Report for the Year ended December 31, 1917.

60	Station masters and assistants, as and (S), Section service employees (except Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832,
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**IMPORTANT CHANGES DURING THE YEAR.**

Hereunder state the following matters, numbering the statements in accordance with the inquiries, and if no changes of the character below indicated have occurred during the year, state that fact:

1601. All portions of road put in operation, giving (a) termini, (b) length of road, and (c) dates of beginning operations.
1602. All other important physical changes, including herein all new trucks built.
1603. All leaseholds acquired or surrendered, giving (a) dates, (b) length of terms, (c) names of parties, (d) rent, and (e) other conditions.
1604. All agreements for truckage rights acquired or surrendered, giving (a) dates, (b) length of terms, (c) names of parties, (d) rent, and (e) other conditions.
1605. All consolidations, mergers, and reorganizations effected, giving particulars.
1606. All stocks issued, giving (a) purposes for which issued, (b) names of stocks and (c) amounts issued, and describing (d) the actual consideration realized, giving (e) amounts and (f) values; give similar information concerning all stocks retired (if any).
1607. All funded debt issued, giving (a) purposes for which issued, (b) names of securities, and (c) amounts issued, and describing (d) the actual consideration realized, giving (e) amounts and (f) values; give similar information concerning all funded debt paid or otherwise retired (if any).
1608. All other important financial changes.
1609. All changes in and all additions to franchises rights, describing fully (a) the actual consideration given therefor, and stating (b) the parties from whom acquired; *if no consideration was given, state that fact.*
1610. All changes in general officers, giving names of outgoing and of incoming officers, and dates of changes.
1611. In case the respondent has not yet begun operation, and no construction has been carried on during the year, state fully the reasons therefor.
1612. All additional matters of fact (not elsewhere provided for) which the respondent may desire to include in its report.

*Horne*

## 1701. STATISTICS OF RAIL-LINE OPERATIONS.

Item No.	ITEM. (a)	AMOUNT.		Item No.	ITEM. (d)	AMOUNT.	
		Entire lbr. (b)	State † (c)			Entire lbr. (e)	State † (f)
1	Average mileage of road operated †			*	CAR-MILES—Continued.		
2	TRAIN-MILES.			18	Freight train—caboose,	45235	
3	Freight,	8076		19	Total,	627060	
4	Passenger,	45235		20	Passenger train,		
5	Mixed.	45474		21	Mixed train—freight—loaded,	25975	
6	Special,	90709		22	Mixed train—freight—empty,	57310	
7	Total transportation service,	3310		23	Mixed train—passenger,	89454	
8	Work service,			24	Special train,		
9	LOCOMOTIVE-MILES			25	Total transportation service,	893803	
10	Freight.	46979		26	Work service,	00	
11	Passenger,	46291		*	FREIGHT SERVICE.		
12	Mixed-train,			27	Tons—revenue freight,	424195	
13	Special,			28	Tons—nonrevenue freight,	1397	
14	Train switching,			29	Total,	425592	
15	Yard switching.	3570		30	Ton-miles—revenue freight,	9386344	
16	Total transportation service,	46840		31	Ton-miles—nonrevenue freight,	16939	
17	Work service,	3768		32	Total ton-miles,	7403283	
18	CAR-MILES.			*	PASSENGER SERVICE.		
19	Freight train—loaded,	318239		33	Passengers carried—revenue,	20195	
20	Freight train—empty,	313586		34	Passenger-miles—revenue,	209621	<i>done</i>

## 1702. REVENUE FREIGHT CARRIED DURING THE YEAR.

Give the particulars called for concerning the commodities carried by the respondent during the year, the revenue from which is includible in account No. 101, "Freight." In stating the number of tons received from connecting carriers, include all connecting carriers, whether rail or water, and whether the freight is received directly or indirectly (as through elevators).

Particulars for items 50 to 55, inclusive, should include all traffic moved at carload rates, and, so far as practicable, traffic moved at "any quantity" rates. Traffic moved at "less than carload" rates may be included in item No. 56 when it is not practicable to distribute it among preceding items.

Item No.	COMMODITY. (a)	Number of tons (2,000 lbs.) of revenue freight received from respondent's road.	Number of tons (2,000 lbs.) of revenue freight received from connecting carriers.	TOTAL REVENUE FREIGHT CARRIED.	
				Number of tons (2,000 lbs. each).	Number of tons (2,000 lbs. each).
50	Products of agriculture,				
51	Products of animals,	159	1063		2222
52	Products of mines,	140	10		150
53	Products of forests,	00	337		307
54	Manufactures,	413434	308		413742
55	Miscellaneous commodities not specified above (carload rates),	3065	1787		4852
56	L. C. L. goods not distributed above,	430	00		430
57	Total,	583	1881		2464
		448809	5386		444497

## EXPLANATORY REMARKS.

Report for the year ended December 31, 1917

## 1801. DESCRIPTION OF EQUIPMENT.

## A. EQUIPMENT OWNED OR LEASED, IN SERVICE OF THE RESPONDENT.

Line No.	ITEM.	Number added during year.	Number retired during year.	Number at close of year.	ITEM.	Box cars.	Flat cars.	Stock cars.	Coal cars.	Truck cars.	Rail- motor cars.	Other freight- motor cars.	Total.
						(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	Steam locomotives.	9	0	3	0								
2	Other locomotives.	0	0	0	0								
3	Passenger-train cars:												
4	Box car.	40	0	4	34	32	46	2				94	155
5	Flat car.	178	0	1	177								
6	Stock car.	2	0	0	2								
7	Coal car.												
8	Truck car.					4	63					67	
9	Refrigerator car.												
10	Carbide car.	3	0	0	3		68		2			70	
11	Other freight-train cars.	86	0	1	75								
12	Total.	311	0	16	295								
13	Passenger-train cars:												
14	Coach.	2	0	0	2								
15	Combination passenger car.	3	0	0	3								
16	Other combination cars.												
17	Baggage car.												
18	Dining car.												
19	Parlor car.												
20	Sleeping car.												
21	Baggage and express car.												
22	Postal car.												
23	Other passenger-train cars.*												
24	Total.	5	0	0	5								
25	Consist service cars:												
26	Officer's and pay car.												
27	Ballast car.												
28	Derrick car.												
29	Steam shovels.												
30	Wrecking car.												
31	Other company service cars.	8	0	0	8								
32	Total.	8	0	0	8								
33	All classes of cars in service.	324	0	16	308								
34	Cars contributed to lease-freight lines.												
35	Passenger equipment:												
36	Steamboats and tugboats.												
37	Barges, car floats, and canal boats.												
38	Other floating equipment.												
39	Total floating equipment.												
40	Total.												
41	Locomotives.												
42	Passenger-train cars.												
43	Freight-train cars.												
44	Company service cars.												
45	Total cars.												

## B. EQUIPMENT OWNED OR LEASED, NOT IN SERVICE OF RESPONDENT.

## REMARKS.

Total

6005300

30

80

1125435

## EXPLANATORY REMARKS.

This space may be used with appropriate cross reference for any detail for which the spaces provided in the form are inadequate.

## VERIFICATION.

The foregoing report must be verified by the oath of the officer having control of the accountings of the respondent. It should be verified, also, by the oath of the president or other chief officer of the respondent, unless the respondent states above on this page that such chief officer has no control over the accounting of the respondent. The oath required may be taken before any person authorized to administer an oath by the laws of the State.

## OATH.

(To be made by the officer having control of the accounting of the respondent.)

State of Louisiana ss:  
County of Paragipahoa

A. B. Stewart (Insert here the name of the affiant.) makes oath and says that he is Auditor (Insert here the official title of the affiant.) of Stewartson and Eastern Railway Company (Insert here the exact legal title or name of the respondent.)

that it is his duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he knows that such books have, during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Interstate Commerce Commission, effective during the said period; that he has carefully examined the said report and to the best of his knowledge and belief the entries contained in the said report have, so far as they relate to matters of account, been accurately taken from the said books of account and are in exact accordance therewith; that he believes that all other statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including

January 1, 1917, to and including December 31, 1917.

signed H. P. Brown (Signature of affiant.)

Subscribed and sworn to before me, Notary Public, in and for the State and county above named, this 12<sup>th</sup> day of July, 1918. (Seal)

My commission expires \_\_\_\_\_

Use as Im-  
L. B.  
pression seal.

(Signed) A. C. Stewartson (Signature of officer authorized to administer oaths.)

## SUPPLEMENTAL OATH.

(By the president or other chief officer of the respondent.)

State of Louisiana ss:  
County of Paragipahoa

Geo. A. Keyser (Insert here the name of the respondent.) makes oath and says that he is General Manager (Insert here the official title of the respondent.) of Stewartson and Eastern Railway Company.

that he has carefully examined the foregoing report; that he believes that all statements of fact contained in the said report are true, and that the said report is a correct and complete statement of the business and affairs of the above-named respondent during the period of time from and including January 1, 1917, to and including December 31, 1917.

(Signed) Geo. A. Keyser (Signature of respondent.)

Subscribed and sworn to before me, Notary Public, in and for the State and county above named, this 17<sup>th</sup> day of July, 1918. (Seal)

My commission expires \_\_\_\_\_

(Signed) A. C. Stewartson (Signature of officer authorized to administer oaths.)

31

**MEMORANDA.**  
(For use of Commission only.)

**A.—EXAMINATIONS.**

EXAMINATION OR COMPUTATION.				PAGE.	SUBJECT EXAMINED.	MEMORANDUM OF ERROR.	CLERK MAKING EXAMINATION.
No.	DATE.						
	Month.	Day.	Year.			Page.	Name.
1							
2							
3							
4							
5							
6							
7							
8							

**B.—CORRESPONDENCE.**

OFFICER ADDRESSED.		DATE OF LETTER OR TELEGRAM.			SUBJECT.	ANSWER NEEDED.	DATE OF "ATTENTION" LETTER OR TELEGRAM.		ANSWER.						FILE NUMBER OF LETTER OR TELEGRAM.	
Name.	Title.	Month.	Day.	Year.			Month.	Day.	Year.	DATE OF—						
										LETTER.			TELEGRAM.			

**C.—CORRECTIONS.**

DATE OF CORRECTION.			PAGE.	SUBJECT.	LETTER OR TELEGRAM OF—		AUTHORITY.		OFFICER OF COMMISSION.	CLERK MAKING CORRECTION.
Month.	Day.	Year.			Month.	Day.	Year.	OFFICER SENDING LETTER OR TELEGRAM.		
							Name.	Title.	Name.	Name.



32

[Endorsed:]

File No. 27,138.

Supreme Court U. S.

October Term, 1919.

Term No. 386.

Brooks-Scanlon Co., Petitioner,

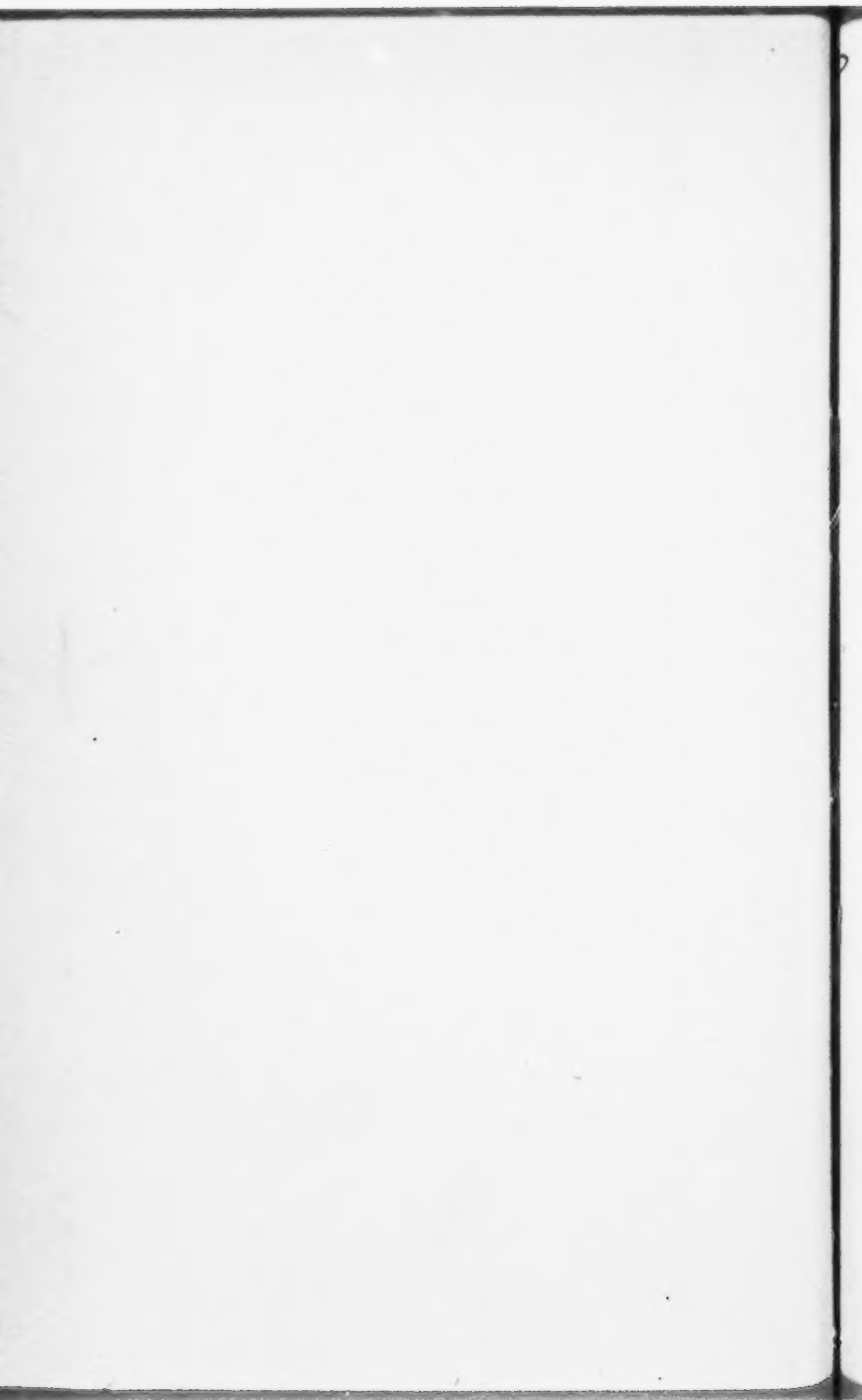
vs.

Railroad Commission of Louisiana.

Stipulation and Addition to Record.

Filed Dec. 22, 1919.

(537)



Minnesota State Library  
St. Paul, Minn.

Office Supreme Court, U. S.  
FILED

NOV 10 1919

JAMES D. MAHER,  
CLERK.

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No. 386

3

# The Supreme Court of the United States

(October Term, 1919.)

---

BROOKS-SCANLON COMPANY,

Plaintiff in Error.

vs

RAILROAD COMMISSION OF LOUISIANA,

Defendant in Error.

---

## JOINT MOTION TO ADVANCE FOR ARGUMENT

---

WYLIE M. BARROW,  
Assistant Attorney General for Defendant in Error.

J. BLANC MONROE,  
Attorney and Counsel for Plaintiffs in Error.

---





No. 386

# The Supreme Court of the United States

(October Term, 1919.)

---

BROOKS-SCANLON COMPANY,

Plaintiff in Error.

v's

RAILROAD COMMISSION OF LOUISIANA,

Defendant in Error.

---

## JOINT MOTION TO ADVANCE FOR ARGUMENT

---

Now come, Railroad Commission of Louisiana, defendant in error, by Wylie M. Barrow, its counsel, and Brooks-Scanlon Company, plaintiff in error, by J. Blanc Monroe, its counsel, and jointly move this Court to advance this cause for argument, by preference, at the earliest convenience of the Court, and as reasons therefor, show:

That this case involves a controversy between plaintiff in error and defendant in error over an

order of the Railroad Commission of Louisiana requiring a railroad lying wholly within the State of Louisiana to be operated;

That in the trial court an injunction prohibiting the discontinuance of train service on said railroad issued on the reconventional demand of defendant in error, was dissolved on bond, and set aside on final trial, and restored by the decision of the Supreme Court of the State of Louisiana, now under review by this Court, but is not effective because of the writ of certiorari issued herein;

That a constitutional question involving the authority and rights of the State of Louisiana is presented;

That this case affects and involves a matter of general public interest to the people of the State of Louisiana.

WYLIE M. BARROW,  
Assistant Attorney General for Defendant in Error.

J. BLANC MONROE,  
Attorney and Counsel for Plaintiffs in Error.

FILED

MAY 29 1919

JAMES D. MAHER,  
CLERK.

No. 1042386

(4)

IN THE

# UNITED STATES SUPREME COURT

OCTOBER TERM, 1918.

BROOKS-SCANLON COMPANY,

Petitioner,

*versus*

RAILROAD COMMISSION OF LOUISIANA,

Petition, Notice and Motion for Writ of *Certiorari* to  
the Supreme Court of the State of Louisiana.

BROOKS-SCANLON CO.,

Petitioner.

ROBERT R. REID,

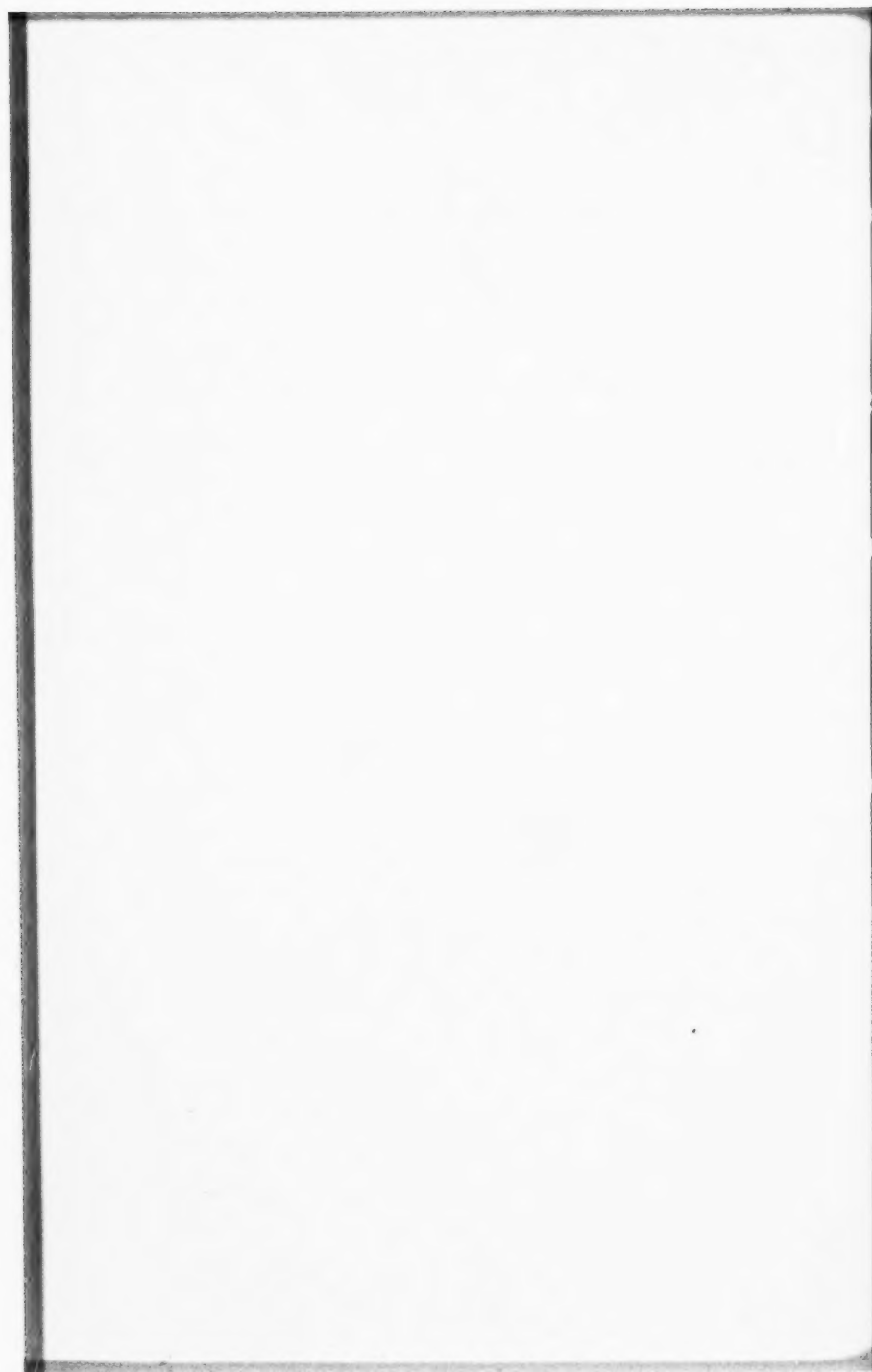
J. BLANC MONROE,

MONTE M. LEMANN,

Counsel for Petitioner.

June 2, 1919.

E. P. Andree Ptg. Co., 516 Natchez St., New Orleans, La.



IN THE  
**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1918.

---

**BROOKS-SCANLON COMPANY,**

**Petitioner,**

***versus***

**RAILROAD COMMISSION OF LOUISIANA.**

---

*To Railroad Commission of Louisiana, Defendant in Error, or W. W. M. Barrow, Its Attorney of Record:*

This is to notify you that plaintiff in error will on Monday, the second day of June, 1919, present to the Supreme Court of the United States, in its court room at Washington, D. C., its motion for a writ of *certiorari* upon its verified petition and a copy of the entire record in this case. A copy of said motion and of said petition and of the brief accompanying said petition, are delivered to you herewith, this 15th day of May, 1919.

**BROOKS-SCANLON COMPANY,**

By R. R. Reid,

J. Blanc Monroe,

Monte M. Lemann,

by J. Blanc Monroe,

Counsel

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of *certiorari* and the brief accompanying same, are hereby acknowledged this 17th day of May, 1919.

W. M. BARROW,  
Attorney for Defendant in Error.

IN THE  
**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1918.

---

**BROOKS-SCANLON COMPANY,**

**Petitioner,**

*versus*

**RAILROAD COMMISSION OF LOUISIANA.**

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Now comes Brooks-Scanlon Company, petitioner, by its counsel, and moves this Honorable Court that it shall by *certiorari*, or other proper process, directed to the Honorable the Judges of the Supreme Court of the State of Louisiana, require said Court to certify to this Court for its review and determination, a certain cause in the said Supreme Court of Louisiana lately pending wherein the petitioner, Brooks-Scanlon Company, was appellant and the said Railroad the said Railroad Commission of Louisiana was appellee, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in the said Supreme Court of Louisiana.

R. R. REID,  
J. BLANC MONROE,  
MONTE M. LEMANN,  
Counsel for Petitioner.



IN THE  
**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1918.

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**BROOKS-SCANLON COMPANY,**

**Petitioner,**

**VERSUS**

**RAILROAD COMMISSION OF LOUISIANA.**

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The petition of Brooks-Scanlon Company, petitioner for *certiorari*, respectfully shows to this Honorable Court that it is a corporation incorporated by charter dated February, 1906. That the Kentwood & Eastern Railway Co. is a separate corporation incorporated under the law of Louisiana by a charter dated December 5, 1905; that subsequent to petitioner's incorporation in February, 1906, it acquired from still another corporation, to-wit, the Brooks-Scanlon **Lumber** Company, certain property, including the roadbed and rolling stock then utilized by the corporation known as the Kentwood & Eastern Railway Company, on a narrow gauge line of railroad between Kentwood, Louisiana and Hackley, Louisiana, a distance of some twenty-nine miles.

That at the time of petitioner's acquisition of said physical property the Kentwood & Eastern Railway Company, a separate corporation, was in possession of said

roadbed and rolling stock under a lease from the former owners and was actually engaged in operating same.

That petitioner confirmed to the Kentwood & Eastern Railway Company the lease made by its predecessor and sold to said railway company the rolling stock utilized on said narrow gauge railway, and the said Kentwood & Eastern Railway Company continued for a time to operate the said narrow gauge line of railroad.

That petitioner has never at any time operated said property as a railroad and has never at any time been engaged in business as a common carrier and is not authorized by its charter to engage in such a business.

That the lease of said physical property to the Kentwood & Eastern Railway Company has been terminated.

That the Kentwood & Eastern Railway Company has ceased to operate said road and that at least a part of said railroad has been torn up.

That on June 4, 1918, the Railroad Commission of Louisiana, on its own motion, instituted against petitioner and the Kentwood & Eastern Railway Company a proceeding to show cause

“why they each should not be required to forfeit any pay to the State the sum of not less than \$100.00 nor more than \$5,000.00 for discontinuing the operation of the narrow gauge railroad of the Kentwood & Eastern Railway Company between Hackley, Louisiana, and Kentwood, Louisiana; and to further show cause why freight and passenger service should not be provided and operated over said railroad by either the Kentwood & Eastern

Railway Company or the Brooks-Scanlon Company, or their successors, agents and assigns",

and after hearing entered Order No. 2228, a copy of which is hereto annexed and made part hereof as an addendum, which order directed petitioner to proceed to operate the railroad in question by running mixed passenger and freight trains thereon, the whole as more fully appears from said order.

That the Kentwood & Eastern Railway Company was dismissed from the proceedings, and no order was entered directing it to resume the operation of said railroad.

That petitioner thereupon filed suit against the Railroad Commission of Louisiana in the 22nd Judicial District Court of Louisiana, seeking to annul the said order No. 2228 on the following grounds:

"Petitioner shows that the said order of the said Commission is unfair, unjust, unreasonable and illegal in the following particulars, to-wit:

"(a) That the charter of your petitioner fixes the general nature of its business to be 'to manufacture, buy, sell and deal in timber, lumber, logs, building material and other personal property; also to buy, own, lease, mortgage, sell, deal in and improve any real estate wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the corporation.'

"That to force your petitioner to engage in the business of a common carrier, not provided for in

its charter, would be to compel it to violate Article 236 of the Constitution of the State of Louisiana of 1878 and Article 285 of the Constitution of the State of Louisiana of 1898 and 1913, as well as the Constitution and laws of the State of Minnesota, all of which prohibit corporations from conducting or engaging in any business not authorized by their charter; that your petitioner has never at any time engaged in the business of a public carrier nor assumed any liabilities of a public carrier.

“(b) That in order to begin operation of such a railroad your petitioner would be compelled to incur an outlay for equipment and repairs to track, rolling stock, material, etc., of over \$50,000, and that said railroad cannot be operated as a public carrier except at a loss of an amount exceeding \$1,500.00 a month. That to compel petitioner to make such expenditure and incur such loss in order to conduct the business of common carrier would amount to depriving petitioner of its property without due process of law and would be the taking of its property to the value of more than \$50,000 without adequate compensation, in violation of Articles 2 and 167 of the Constitution of the State of Louisiana, and Article 5 and Section 1 of Article 14 of the Amendments to the Constitution of the United States. That said Articles and provisions of said constitutions are expressly pleaded as causes of nullity and invalidity of aforesaid order of said Railroad Commission.

“(c) That your petitioner has never held itself as a common carrier nor assumed any obligations or rights of such carrier, and is under no legal ob-

ligation by contract or otherwise to operate passenger or freight trains as a public carrier over said narrow gauge line. That, as hereinabove set forth, your petitioner could comply with said order of said Commission only in violation of the terms of its charter and in violation of the Constitution of the State of Minnesota, under which it was organized, and of the State of Louisiana, where it is doing business, and with great loss to itself amounting to confiscation of its property without due process of law or adequate compensation."

That the Railroad Commission of Louisiana answered said petition, asserting the validity of its order No. 2228 and asking for an interlocutory injunction restraining petitioner from taking up the rails on the Kentwood & Eastern roadbed. That the interlocutory injunction thus prayed for was issued *ex parte* and was bonded by petitioners. That thereafter a trial was had in the 22nd Judicial District Court and a judgment rendered in petitioner's favor, declaring said order No. 2228 null and void and dissolving the injunction obtained by the Railroad Commission.

That the Railroad Commission appealed to the Supreme Court of Louisiana and that tribunal reversed the judgment of the lower Court, reinstated the injunction obtained by the Commission and dismissed plaintiff's suit.

That the record fully substantiates the ground of complaint and relief set forth by petitioner in its original

suit and quoted *supra*, and that to compel petitioner to expend \$50,000 to \$60,000 and thereafter to operate a railroad in contravention of its charter at a loss of from \$1,500 to \$3,000 a month constitutes a taking of its property without due process of law, a denial to it of the equal protection of the law, a divesture of its vested rights and an impairment of the obligations of its contract in derogation of the Constitution of the United States, particularly Amendments 5 and 14, and Article 1, Section 10, Paragraph 1.

Petitioner annexes hereto (1) the requisite number of printed copies of this petition; (2) the requisite number of printed copies of a brief supporting this petition; (3) evidence showing service of this petition and annexed documents upon opposing counsel; (4) a certified copy of the entire transcript of the proceedings in the lower Court and in the Supreme Court of Louisiana.

Wherefore, petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court directed to the Supreme Court of Louisiana, sitting at New Orleans in said State, commanding the Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of said Court had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by Section 237 of the Judicial Code as amended, and that the said judgment of the said Supreme Court of Louisiana may be reversed by this Honorable Court, and

for such further relief as may seem proper, and your petitioner will ever pray, etc.

**BROOKS-SCANLON COMPANY.**

By R. R. Reid,

J. Blanc Monroe,  
Monte M. Lemann,  
Attorneys.

State of Louisiana,

ss

Parish of Orleans.

Personally appeared before me, the undersigned Notary Public in and for the foregoing Parish and State, J. Blanc Monroe, who, being duly sworn, says that he is counsel for the petitioner, Brooks-Scanlon Co., and that he knows of the proceedings had and that the facts stated in the foregoing petition are true and correct to the best of his knowledge and belief.

J. BLANC MONROE,

Sworn to and subscribed to before me this 23rd day of May, 1919.

WATTS K. LEVERICH,  
Notary Public.

**ADDENDUM.**

**No. 2278**

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**RAILROAD COMMISSION OF LOUISIANA**

**ORDER NO. 2228.**

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**RAILROAD COMMISSION OF LOUISIANA,**

***versus***

**THE KENTWOOD & EASTERN RAILWAY CO.**

**and**

**THE BROOKS-SCANLON COMPANY.**

---

**In Re Operation of Narrow Gauge Railroad Between  
Kentwood, Louisiana, and Hackley, Louisiana.**

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Proceeding on its own motion, the Railroad Commission of Louisiana on June 4th, 1918, issued a notice to the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company, the former a Louisiana corporation, and the latter a Minnesota corporation doing business in the State of Louisiana, both domiciled at Kentwood, Louisiana, to show cause why they each should not be required to forfeit and pay to the State the sum of not less than One Hundred (\$100.00) Dollars nor more than Five Thousand (\$5,000.00) Dollars, for discontinuing the operation



of the narrow guage railroad of the Kentwood & Eastern Railway Company between Hackley, Louisiana, and Kentwood, Louisiana; and to further show cause why freight and passenger service should not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or the Brooks-Scanlon Company, or their successors, agents or assigns.

Both companies, in due course, filed answers to the rule, and the case was assignd for hearing at Baton Rouge on June 25, 1918.

At the hearings on June 25 and 26 evidence was introduced on behalf of the Commission and the defendants, and after a full investigation the matter was taken under advisement. The substantial facts are as follows:

The Banner Lumber Company was incorporated under the laws of the State of Louisiana, by notarial act dated August 16, 1895, for the purpose of manufacturing, buying and selling lumber and merchandise. This company built a narrow guage railroad between Kentwood and Hackley, which it used for hauling its lumber and logs. The testimony of witnesses living at Mount Herman, Louisiana, shows that the Kentwood & Eastern Railroad carried passengers and freight for hire almost from the beginning of its operation, and the records of the Commission show that about the year 1905 the Kentwood & Eastern Railroad made reports to the Railroad Commission of Louisiana covering its operations, the said reports bearing the notation "owned and operated by the Banner Lumber Company." Its operation as a common carrier was continued

and the road was used by the public almost from its initial operation.

On the first day of November, 1905, the Brooks-Scanlon Lumber Company, a Minnesota corporation, purchased from the Banner Lumber Company its timber holdings and the Kentwood & Eastern Railroad. The Brooks-Scanlon Lumber Company continued the operation of the Kentwood & Eastern Railroad for the period from November 1, 1905, until December 5, 1905, when the Kentwood & Eastern Railway Company was incorporated, and assumed the expenses and earnings of the railroad from November 1, 1905. The Brooks-Scanlon Lumber Company, however, continued all of the operations during the period of from November 1, 1905, to December 5, 1905. On December 5, 1905, the Kentwood & Eastern Railway Company was incorporated by notarial act. The Brooks-Scanlon Lumber Company did not sell the roadbed and track, or the equipment, to the Kentwood & Eastern Railway Company, but, under a verbal lease, arranged for the operation of the Kentwood & Eastern Railroad by the Kentwood & Eastern Railway Company, the Kentwood & Eastern Railway Company agreeing to lease and operate the railroad and to purchase the equipment.

In February, 1906, the Brooks-Scanlon Company was organized, and took over all of the property acquired by the Brooks-Scanlon Lumber Company from the Banner Lumber Company, including the narrow gauge railroad, and its equipment and rolling stock, the latter,—that is, the Brooks-Scanlon Lumber Company and the Kentwood & Eastern Railway Company.

The agreement between the Brooks-Scanlon Lumber Company and the Kentwood & Eastern Railway Company was a verbal agreement, and, it was stated by witnesses familiar with the agreement, that the Brooks-Scanlon Lumber Company agreed to sell the rolling stock and equipment of the narrow guage railroad to the Kentwood & Eastern Railway Company, and to lease the railroad to the Kentwood & Eastern Railway Company for a period of twenty (20) years, at a rental of \$10,000.00 per annum, payable in monthly installments. A written lease was ultimately executed in accordance with the verbal lease. This lease contained a stipulation that either party might terminate the same upon giving six months written notice to the other.

About February, 1905, the Kentwood & Eastern Railway Company began the construction of a standard guage railroad and continued the operation of its narrow guage railroad under the terms of the lease above referred to.

The principal traffic over the narrow guage railroad was the hauling of timber and logs. The public along the line used it continuously. Investments were made in properties along the right of way, land values increased, and the country through which the narrow guage railroad operated showed a marked development.

In the summer of 1917, the lumber and timber traffic began to diminish, but the interest of the public living along the railroad in having adequate transportation facilities was considerable. In October, 1917, the Brooks-Scanlon Company, for reasons known to itself, and divulged to the Commission at the hearing, served notice on the

Kentwood & Eastern Railway Company of the cancellation of the lease at the end of six months time. The attorneys for the Kentwood & Eastern Railway Company consulted the Commission, and, after receiving written notice of a session to be held in the City Hall at New Orleans on January 22, 1918, appeared at that hearing and stated to the Commission that the Kentwood & Eastern Railway Company had been notified by the Brooks-Scanlon Company of the cancellation of the lease, and that it intended to discontinue operations after complying with such rules as the Commission might have on the subject. After consulting its counsel the Commission notified the attorney for the Kentwood & Eastern Railway Company, as follows:

"Relative to your statement concerning the discontinuance of the Kentwood & Eastern Railway Company, I beg to advise that the matter was considered by the Commission, and I was instructed to say to you that under the circumstances it would only be necessary for you to file formal notice of the proposed discontinuance in writing with the Commission. Notice should also at once be given the public. Further than this there are no requirements by the Commission."

Pursuant to this notice, the Kentwood & Eastern Railway Company published and posted at points along the narrow guage railroad the following notice:

"Notice to the Public,

"Kentwood, Louisiana.

"January 29, 1918.

"Notice is hereby given that the Kentwood & Eastern Railway Company will discontinue service

over the narrow guage railway track running from Kentwood, Louisiana, to Hackley, Louisiana, after April 21, 1918, its lease on said railroad track having been cancelled, and terminated by the owners thereof."

The Kentwood & Eastern Railway Company subsequently, requested authority from the Commission to cancel its intrastate local and joint rates, and the authority was granted.

The Kentwood & Eastern Railway Company shows that for some periods of time it made a profit out of the operation of the narrow guage railroad, and has at all times made a profit out of the operation of the entire properties other than the leased narrow guage line.

After notice was filed, and on or about the twenty-second day of April, 1918, the Kentwood & Eastern Railway Company discontinued operating trains on the narrow guage track between Kentwood and Hackley, and the Brooks-Scanlon Company made no provision for a continuation of the service. Complaints were then made to the Commission that the service had been discontinued but no action was taken by the Commission until the issuance of the notice in this case, for the reason that the Commission was advised by its counsel, and believes that it had no jurisdiction in the matter of determining which of the two corporations should operate the Kentwood & Eastern Railway, that being the subject of a suit filed by the State of Louisiana on the relation of C. M. Tate and others, against the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company, in which the State obtained an injunc-

tion to prevent the discontinuance of the service over the narrow guage railroad. The case went to the Supreme Court on an exception to the jurisdiction of the court, and the Supreme Court of Louisiana in a very concise opinion on May 27, 1918, in the case of "*State of Louisiana, ex rel, C. M. Tate, et al., v. Brooks-Scanlon Company and Kentwood & Eastern Railway Company*", held

"that the matter and things here presented for decision affects and includes the service to be given the public by the defendant railroad company and the operation of a railroad within the State. It is a matter exclusively within the jurisdiction of the Commission, and the decision of that body thereon is subject to review at the suit of the railroad affected by the decision in the District Court at the domicile of the Commission, and in the Supreme Court on appeal (Const. Art. 285). It is only after the Commission has acted that the Court may be appealed to."

Prior to this decision of the Supreme Court the Commission had proceeded on the belief that it was without jurisdiction to determine which of the two companies owed the duty of operating the railroad, which has previously, for many years, been engaged in the business of a common carrier. As soon as the Supreme Court rendered its decision, the Commission, as stated, instituted, on its own motion, these proceedings.

It was shown at the hearing that there is substantial traffic over the narrow guage railroad of the Kentwood & Eastern Railway, and a considerable body of the public is dependent upon this line for transportation.



The letter and authorities which have been referred to heretofore are said by the defendants in this case to constitute orders or authorities on the part of the Commission to discontinue the railroad. Such is not the case. The Railroad Commission has never acted upon any application to discontinue the railroad further than to advise the Kentwood & Eastern Railway Company that it had no rules to prevent its discontinuance. Our letter addressed to the attorney of the Kentwood & Eastern Railway Company was simply a disclaimer of jurisdiction.

On February 9th, 1918, the Chairman of the Commission addressed a letter to Mrs. C. M. Tate, Mount Herman, Louisiana, in which the position of the Commission is made clear; and it is as follows:

"February 9th, 1918.

"Hon. C. M. Tate,

"Mount Herman, Louisiana.

"Dear Sir:

"With further reference to our correspondence concerning the proposed discontinuance of operations on a certain portion of its line from Kentwood to Hackley by the Kentwood & Eastern Railway Company, I beg to enclose you herewith a copy of an opinion received this morning by the Commission from its counsel, Hon. W. M. Barrow, Assistant Attorney General. You will note that Mr. Barrow, after having carefully considered this matter, advised the Commission that it is without power or authority to interfere with the discontinuance of this line of railroad. Were the Commission vested with power in the premises I assure you that ev-

ery effort would be made to assist the people and communities affected, but, under the circumstances, it appears that there is nothing to be done.

"Deeply regretting my inability to be of service to you, I am

"Very truly yours,

(Signed)

"SHELBY TAYLOR,

"Chairman."

After the Railway Company notified the Commission of its intention to discontinue its operations, the Commission allowed the cancellation of the tariffs in effect so as to prevent confusion in shipments. But this was far from determining that the railroad company might discontinue its operations to the great inconvenience and discomfort of the public it served.

We are of the opinion, and hold, that the Kentwood & Eastern Railway is an important transportation facility, serving a public dependent upon it exclusively for its transportation, and that the discontinuance of this line would result in an unnecessary burden and unusual hardship on the public. The Brooks-Scanlon Company, while contending that its charter does not permit it to operate a railroad, loses sight of the fact that its officers and owners owned a railroad for a number of years; and that they bought this railroad as a going concern from another company which operated as a common carrier railroad; that from its organization until April 20, 1918, the railroad was operated without interruption, at all times serving the public and participating in both local and joint through rates. The Brooks-Scanlon Company, in order to provide for the op-

eration of the railroad, leased it to the Kentwood & Eastern Railway Company, but we do not believe that this in any sense relieved the Brooks-Scanlon Company from its obligations to operate the Kentwood & Eastern narrow guage railroad.

While operated by the Kentwood & Eastern Railway Company, the Kentwood & Eastern Railroad did not exercise the power of eminent domain (as covered by argument.) It has always contended that it was important to the territory it served, having insisted before the Interstate Commerce Commission in the *Tap Line Case* that it was a full fledged common carrier serving a thickly settled territory, to and through which it was an important artery of commerce. The Commission cannot give its consent to the discontinuance of this railroad, and while in view of the circumstances, a fine does not at this time seem warranted, the Brooks-Scanlon Company will be required to operate the Kentwood & Eastern Railroad. Nothing in the charter of the Brooks-Scanlon Company prevents this from being done.

In the lease between the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company, the following is the opening paragraph:

"Whereas, the party of the first part (Brooks-Scanlon Company) is the owner of a certain line of narrow guage railroad in the State of Louisiana extending from Kentwood in the Parish of Tangipahoa in said Louisiana, in an easterly direction to Hackley, in said Louisiana, known as the Kentwood & Eastern Railway Company."

This, in itself, is sufficient to establish the fact that the Brooks-Scanlon Company is the real owner of the Kentwood & Eastern Railroad.

In the charter of the Brooks-Scanlon Company it is provided that

**"the general nature of its business shall be to manufacture, buy, sell and deal in timber, lots, lumber, buildings materials, and other personal property; also to buy, own, lease, mortgage, sell, deal in, and improve any real estate wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the corporation."**

This language is broad enough to include the operation of a railroad, if such railroad is necessary or proper for the accomplishment of the purposes of the Brooks-Scanlon Company.

Even, however, if there be doubt as to the right of the Brooks-Scanlon Company to operate a railroad under its charter, with which conclusion we do not agree, still, nevertheless, the fact remains that the individuals owning the Brooks-Scanlon Company have in their possession a common carrier railroad, and owe a continuing duty to the public.

The premises considered, it is,

ORDERED, That no fine be imposed in these proceedings, in view of the circumstances and confusion surrounding the case. It is further,

ORDERED, That the Brooks-Scanlon Company, either directly or through arrangements made with the Kent-

wood & Eastern Railway Company, shall operate, its narrow guage line of railroad between Kentwood, Louisiana, and Hackley, Louisiana, by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the Commission, the said Brooks-Scanlon Company or its lessee, to prepare and submit to the Commission for its approval without delay, a time table showing the schedules upon which it is proposed to operate such trains. It is further,

ORDERED, That the rates which were formerly in effect over the narrow guage railroad between Kentwood and Hackley when operated by the the Kentwood & Eastern Railway Company shall be, and are hereby, reinstated with 25% added, the minimum carload charge to be \$15.00 per car. It is further,

ORDERED, That all orders and authorities in conflict herewith, be and the same are hereby, declared cancelled, rescinded and annulled.

BY ORDER OF THE COMMISSION.

Baton Rouge, Louisiana,

August 5, 1918.

SHELBY TAYLOR,

Chairman.

B. A. BRIDGES,

JOHN T. MICHEL,

Commissioners.

HENRY JASTREMSKI,

Secretary.

**CERTIFICATE TO ORDER 2228.**

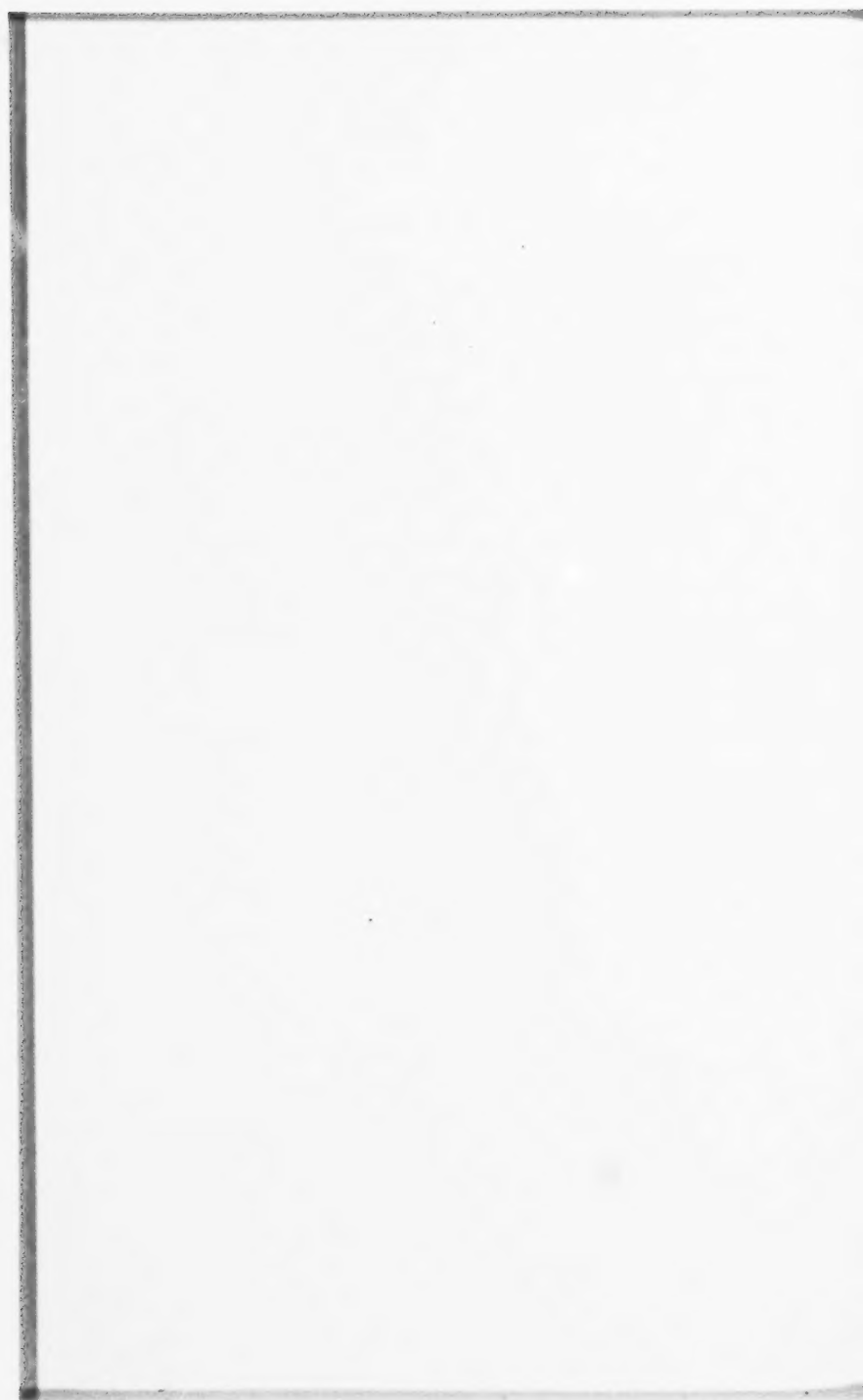
I, Henry Jastremski, Secretary of the Railroad Commission of Louisiana, do hereby certify that the hereto attached is a true and correct copy of Railroad Commission of Louisiana Order No. 2228, adopted by the said Railroad Commission of Louisiana, August 5, 1918, in case No. 2778, *In Re Railroad Commission of Louisiana v. The Kentwood & Eastern Railway Company* and the *Brooks-Scanlon Company*, the original of which being on file and of record in the office of our Commission at Baton Rouge, Louisiana.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Commission this the 4th day of September, 1918.

(Signed)

HENRY JASTREMSKI,  
Secretary.





St. Paul, Minn.

MAY 29 1919

JAMES D. MAHER,  
CLERK.

No. 1  386

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IN THE

# UNITED STATES SUPREME COURT

OCTOBER TERM, 1918.

BROOKS-SCANLON COMPANY,

Petitioner,

*versus*

RAILROAD COMMISSION OF LOUISIANA,

Brief in Support of Application for *Certiorari* to Supreme  
Court of the State of Louisiana.

BROOKS-SCANLON CO.,

Petitioner.

ROBERT R. REID,

J. BLANC MONROE,

MONTE M. LEMANN,

Counsel for Petitioner.

June 2, 1919.

E. P. Andree Ptg. Co., 516 Natchez St., New Orleans, La.



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IN THE  
**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1918.

---

**BROOKS-SCANLON COMPANY,**  
Petitioner,

**VERSUS**

**RAILROAD COMMISSION OF LOUISIANA.**

---

**SYLLABUS.**

1. Compelling a corporation to operate a railroad for public convenience at a loss of from \$1,500 to \$3,000 per month constitutes a taking of its property without due process of law and a denial to it of the equal protection of the laws in violation of the Constitution of the United States.
  2. When a corporation which is not authorized by its charter to operate a railroad, and which has never operated a railroad or held itself out as operating a railroad, is compelled to operate a railroad at a loss, its charter rights, its contract rights and its vested property rights are invaded in violation of the Constitution of the United States.
- 

*If the Court Please:*

Petitioner, the Brooks-Scanlon Company, has never operated a railroad. Its charter does not permit it to operate a railroad. It acquired the physical property of



a narrow gauge road some twenty-nine miles long, extending from Kentwood, Louisiana, to Hackley, Louisiana, together with a saw mill, some timber, etc., from another corporation. At the time of the acquisition of the narrow gauge road in question that road was being operated by a separate corporation. The Brooks-Scanlon Company at no time undertook to operate the road. It simply confirmed the lease of the roadbed and appurtenances to a separate corporation, namely, the Kentwood & Eastern Railway Company, and sold to that company the rolling stock and other movable property necessary for the operation.

As time went on, the lumber along the line was cut out and conditions changed. The Kentwood & Eastern Railway Company was operating at a loss. The lease was terminated and the train service discontinued. The Railroad Commission of Louisiana, of its own motion, conducted a hearing, to which it summoned both the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company, and in which it called on them to show cause why they should not continue to operate the railroad. During the hearing the Kentwood & Eastern Railway Company was dismissed and ultimately an order was entered directing the Brooks-Scanlon Company to operate the road. The Brooks-Scanlon Company has no rolling stock and no equipment. It will require from \$50,000 to \$60,000 to provide rolling stock and equipment, and will require some \$10,000 additional to bring the roadbed from the condition in which it was at the time the pro-

ceedings were begun up to a safe condition for use. The record shows affirmatively that after all this is done the actual cost of operating the property will exceed the income by from \$1,500 to \$3,000 per month. This Court is, therefore, presented with the blunt question

### **CAN A STATE RAILROAD COMMISSION COMPEL A RAILROAD TO OPERATE AT A LOSS?**

We respectfully submit that the decisions heretofore handed down by this Court and the logic of the situation give a negative answer to that question.

This Court has held, notably in the case of *Northern Pacific R. Co. v. North Dakota*, that a railroad commission cannot compel a carrier to transport a single commodity at a loss. This Court has held in a large number of cases that a railroad commission cannot compel a carrier to put into effect such a system of rates as to net a loss upon its entire business. This Court has further held that when all of the business of the carrier resulted in a loss the carrier could surrender its public use and retire from the railroad business. In support of these propositions, we submit the following authorities. We call the Court's particular attention to the language used by Chief Justice Waite in the old, well-reasoned and leading case of *Munn v. Illinois*, where he said, speaking of a public servant: "He may withdraw his grant by **discontinuing the use**, but so long as he maintains the use he must submit to the control." And to the language used in the case of *Northern Pacific R. Co. v. Dustin*, 142 U. S. 449, where the Court said,

"but if the charter of a railroad corporation simply authorizes the corporation, without requiring it to construct and maintain a railroad to a certain point, it has been held that **it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative.**"

The cases on the subject are as follows:

94 U. S. 113, *Munn v. Illinois*.

This is the old leading case on the subject. In it Mr. Chief Justice Waite, at page 126, said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and **must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use;** but so long as he maintains the use he must submit to the control." (Black letters by present writer.)

This language was expressly approved by Mr. Justice Pitney and Mr. Justice Van Devanter in the *Adamson case* (*Wilson v. New*, 243 U. S., 335), they saying on page 385:

"The extent to which regulation may properly go under such circumstances, was defined very clearly by this Court in the great case of *Munn v. Illinois*, 94 U. S. 113, where Mr. Chief Justice Waite, speaking for the Court, said, page 126:

'Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community a large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control.' The control there referred to was a regulation by the State of the service performed by public warehouses and the limits of the charges for that service. The opinion made it plain that the interest of the public was not in the property but in the use of it; that not its management or disposition in general but only its use in the service of the public was subject to control."

142 U. S. 499, *Northern Pacific Railroad Co. v. Dustin*:

"If, as in *Union Pacific Railroad Co. v. Hall*, 91 U. S., 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State v. Hartford and New Haven Railroad*, 29 Conn., 538), and it has so constructed its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of a statute. *New Orleans, etc., R. R. v. Mississippi*, 112 U. S., 12;

*Page v. Boston & Albany R. R.*, 17 N. Y., 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative. *York v. North Midland Ry. v. The Queen*, 1 El. & Bl., 858; *Great Western Ry. v. The Queen*, 1 El. & Bl., 174; *Commonwealth v. Fitchburg*, 12 Gray, 180; *State v. Southern Minnesota Ry.*, 18 Minn. 40. (Black letters by present writer.)

145 Fed. 286, *State of South Carolina v. Jack*:

"As adverted by the Circuit Court, the power given by the charter was in terms permissive to build the railroad and not mandatory to maintain it. When the condition is such as existed when the fifteen miles of the rails were removed, it has been held that the owners of the road cannot be compelled to reconstruct and maintain it when it would not be remunerative. *Northern Pacific R. R. v. Dustin*, 142 U. S., 492. The fact that the road does not pay the expenses of running the trains is persuasive evidence that the service to the public does not require it to be kept in operation. *Morrowitz on Private Corporations*, par 1119.

113 Fed. 823, *Jack v. Williams*. Simonton, J.:

"A railroad is in a sense a public concern. To its construction and operation the action of the sovereign is needed. If a corporation is created the franchise to be a corporation can be given only by the sovereign. Its franchise as a common car-

rier for hire of passengers and freight comes from the sovereign. Its right to exercise the right of eminent domain can come only from the sovereign, and as its road is in a sense a highway, the sovereign grants that also. A consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable and the reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. **Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration.** No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. *Smyth v. Ames*, 169 U. S., 467; *Road Co. v. Sanford*, 164 U. S., 578; *C. M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 118; *R. R. Co. v. Smith*, 173 U. S., 684; all these cases determine that a railroad company in the full enjoyment and use and capacity to use its franchises can not be compelled to exercise its franchise without reasonable remuneration. *A fortiori* a railroad company or a person owning a railroad cannot be compelled to operate that road not only without remuneration, but at a loss, and this not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds he cannot be compelled to use a dollar of his wealth for public purposes without compensation."

Continuing, Judge Simonton, after careful and unanswerable reasoning, concluded that the owners had a right to abandon the property and take up the rails.

11 N. E., 347, *O. & M. Ry. Co. v. People of Illinois*:

Syllabus: "Where mandamus is asked to compel a railroad to run its trains more frequently over a certain part of its road and to repair and put in safe condition such part of the road, and the company answers that such part of the road has never paid expenses and that it is financially unable to make the repairs demanded or run additional trains, the writ will be refused. (Page 350.) On the other hand, if the line of road is not capable under any management of being made self-sustaining it simply shows there is no demand or necessity for the road, and the sooner, therefore, the State revokes the franchise the better. A business that will not pay ought not to be followed, as it adds nothing to the wealth of those pursuing it or of the State."

The foregoing authorities are directly in point. The following authorities are strongly analogous. Those authorities clearly hold that a railroad cannot be compelled to maintain a schedule of rates which is not remunerative, because the compelling of a railroad to maintain such a schedule of rates would be a taking of its property without due process of law. There would seem to be no difference in principle between the case in which a railroad's property is taken from it by a low schedule of rates and the case in which a corporation's property is actually and physically taken from it because it is ordered to operate a railroad



when it knows in advance that the result of that operation will be a net loss of from \$1,500 to \$3,000 per month. Such an order is no more nor less than a confiscation of the corporation's bank account, for the reason that it is an order compelling a corporation to go into its bank account and at its own expense to maintain and operate freight and passenger trains for the benefit of the public. We respectfully submit that the above quoted and the following authorities bear us out in the contention that such an order contravenes and takes from the Brooks-Scanlon Company the rights which are guaranteed to it by the Constitution of the United States.

246 U. S. 195, *Denver v. Denver Union Water Co.*

In this case the Court, speaking through Mr. Justice Pitney, held that a water rate which only yielded to the water company four and three-quarters ( $4\frac{3}{4}$ ) per cent on its investment when six (6) per cent was the rate on secured loans in the community was confiscatory. The Court said, page 194:

"We have no hesitation in holding that the return yielded by the ordinance now before us is clearly inadequate and amounts to the taking of complainants property without due process of law contrary to the provisions of the fourteenth amendment, in that regard, even excluding from consideration the disputed water rights."

244 U. S. 391, *Mississippi Railroad Commission v. M. & O. R. R.*

The Court, speaking through Mr. Justice Clarke, said:

"While the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation, or without due process of law. *M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *A. C. L. R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585; *C. M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491. If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, it passes beyond lawful bounds and is void, because repugnant to the due process of law provision of the 14th amendment to the Constitution of the United States. *A. C. L. R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1; *M. P. R. Co. v. Tucker*, 230 U. S. 340; *M. P. R. Co. v. Nebraska*, 217 U. S. 196; *Northern P. R. Co. v. North Dakota*, 236 U. S. 585.

214 U. S. 301, *Southern R. Co. v. St. Louis Hay Co.*

"If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligation to furnish sleeping and

other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when as here the privilege is in no sense a part of the transportation but outside thereof. Whether the conclusion of the Commission that the carrier is under no obligation to permit the interruption of the transit, is right, and whether it is or is not under such obligations, it is entitled to receive some compensation beyond the mere cost for that which it does."

206 U. S. 1, *A. C. L. R. Co. v. North Carolina Corp. Commission*. The Court, speaking through Mr. Chief Justice White, said, page 20:

"As the public power to regulate railroads and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights finds protection in constitutional guaranties, and, therefore, **wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement on the right of ownership, such an exertion of the power is void**, because repugnant to the due process and equal protection clauses of the 14th amendment (Quoting numerous authorities in the margin)."

On page 24:

"The principle upon which the case in question proceeded was thus summed up by Mr. Justice Har-

lan, delivering the opinion of the Court in *Smythe v. Ames*, 169 U. S. 526:"

"A state enactment and regulations made under the authority of the state enactment establishing rates for the transportation of persons or property by rail that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws and would, therefore, be repugnant to the 14th amendment to the Constitution of the United States.' But this case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of a state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course, the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad in and of itself demonstrates the unreasonableness of the order."

230 U. S. 340, *M. P. Ry. Co. v. Tucker*. The Court, speaking through Mr. Justice Van Devanter, said at page 347:

"Primarily it is to be observed that the rates prescribed by the Legislature while presumably valid are not conclusively so; that to require the company in the operation of its road to give effect to rates which prevent it from obtaining a reasonable return from the service given to the public

is to deprive it of its property without due process of law, and that whether the prescribed rates are themselves in excess of the state's power (see *A. C. L. R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1) is a question which the company is entitled to have determined in an appropriate judicial proceeding."

230 U. S. 433, *Minnesota Rate Case*. The Court, speaking through Mr. Justice Hughes, said:

"Here we have a general schedule of rates involving the profitableness of the intrastate operation of the carrier taken as a whole, and the inquiry is whether the state has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the law.

"The property of the railroad corporation has been devoted to the public use. It is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to avoid—that there shall not be an exorbitant charge for the service rendered. But the state has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public."

236 U. S. 595, *Northern P. R. Co. v. North Dakota*. The Court, speaking through Mr. Justice Hughes, said:

"The general principles to be applied are not open to controversy. Railroad property is private property devoted to a public use. As a corporation the owner is subject to the obligations of its charter. As the holder of special franchises it is subject to the conditions upon which they are granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities which are reasonably adequate. It must carry upon reasonable terms and it must serve without unjust discrimination. These duties are properly called public duties and the state within the limits of its jurisdiction may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases and to promote safety, good order and convenience."

"But broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to the public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned to the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. It has held itself out as a carrier of passengers only it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justifica-

tion for demands which pass the limits of reasonable protection and seek to impose on a carrier and its property burdens which are not incident to its regulation. In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lakeshore & Mich. Southern R. Co. v. Smith*, 173 U.S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *M. R. Ry. Co. v. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of its receipts from its entire business would not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the state's protective power."

238 U. S. 491, *C. M. & St. P. R. Co. v. Wisconsin*. Headnote one, reads:

"A state cannot authorize an individual to take salable property from another without pay—it amounts to deprivation of property without due process of law"

This case dealt with the Wisconsin statute which prohibited the Pullman Company from pulling down unused upper berths.

116 U. S. 331, *The Railroad Commission Cases*. Speaking through Mr. Chief Justice Waite, the Court said:

"From what has thus been said it is not to be inferred that this power of limitation and regula-



tion is in itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights **the State cannot require a railroad corporation to carry persons or property without reward.** Neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

169 U. S. 466, *Smythe v. Ames*. The Court said at page 524:

"It has always been a part of judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to deprive the other party of any rights of person or property. In every constitution there is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which by the 14th amendment no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public. This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government with its constitutional limitations and guaranties, the forms of law and the machinery of government with all their reach and power, must in their actual workings stop on the hitherside of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held. \* \* \* In *Covington & Lexington Turn-*

*pike Road Co. v. Sanford*, 164 U. S. 578, which involved the validity of a state enactment prescribing rates of toll on a turnpike road the Court said: 'A statute which by its necessary operation compels a turnpike company when charging only such tolls as are just to the public to submit to such further reduction of rates as will prevent it from keeping its road in repair and from earning any dividends whatever for stockholders is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority under its charter to collect and receive tolls for passengers and freight.' "

These authorities make it clear that no state has the power through any legislation, either direct or indirect, to compel a carrier to charge such a schedule of rates on all of its business as not to allow it a fair return on its investment. Such a statute under the unanimous expressions of all of these decisions would be a taking from the carrier of its property without due process of law in contravention of the Constitution of the United States. This Court has held in the case of the *Northern Pacific R. Co. v. North Dakota*, that no state could segregate one particular class of traffic and compel a carrier to carry that class of traffic at less than cost, because as Mr. Justice Hughes, speaking for the Court, concluded, such a requirement would constitute a taking of the carrier's property without due process of law. In the case at bar, we have a condition in which the yield from all of the traffic tendered and of all of the business to be done is not sufficient to defray the cost of maintaining the operation. Under these cir-

cumstances it is obvious that if the state, by any direct or indirect legislation, can compel the carrier to maintain the operation, the state will be permitted to take the private property of the carrier and utilize it for a public purpose. That is to say, the carrier must provide from its private purse the expense necessary to handle such infinitesimal traffic as tenders. The taking by the State of the property of the carrier for this purpose would amount and does amount to the confiscation by the state of the property of the carrier and is, therefore, directly under the principle laid down in these cases and because of that principle in conflict with the Constitution of the United States. If a state cannot compel a carrier to transport a particular class of traffic at a loss *a fortiori* a state can not compel a carrier to transport all of its traffic at a loss, and if the net return from all of its traffic shows a certain loss the state can not compel the carrier to operate at all, and if the carrier can not operate at all without a loss and can not be compelled to operate at all, then the carrier has a right to take its property out of the public use entirely and to devote it to its private purposes. It is this right for which we contend in this case. It is this right of which we have been deprived by the statute of the State of Louisiana creating the Railroad Commission of Louisiana, and by the order of the Railroad Commission of Louisiana enforcing that statute and directing us to operate this entire line of railroad at a loss.

## II.

**THE BROOKS-SCANLON COMPANY'S CHARTER  
DOES NOT PERMIT IT TO OPERATE  
A RAILROAD.**

The charter of the Brooks-Scanlon Company appears in the transcript at page —. Nowhere in that charter is there any authority granted to it to operate a railroad. It has never in its history operated a railroad. Notwithstanding this, the Supreme Court of Louisiana by its decision enforcing Order No. 2228 of the Railroad Commission of Louisiana is compelling it to operate a railroad. This we respectfully submit is a violation of the rights which are guaranteed to it by the Constitution of the United States. As was said by Mr. Justice Hughes in the case of the *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 595:

"The fact that the property is devoted to the public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned to the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held out as a carrier of passengers only it can not be compelled to carry freight. As a carrier for hire it can be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification

of demands which pass the limits of reasonable protection and seek to impose on a carrier and its property burdens which are not incident to its regulation."

In the case at bar the Brooks-Scanlon Company has never held itself out as a carrier at all. Its sole connection with the matter was that it purchased the physical property of a railroad company and continued a lease of the roadbed and equipment which had been made by the former owner. It at once sold to the lessee all of the rolling stock and movable property and did not either directly or indirectly assume the management or control of the business.

The Supreme Court of Louisiana has stated that a number of the stockholders of the Brooks-Scanlon Company were also stockholders of the Kentwood & Eastern Railway Company, and that therefore there was a similarity or unanimity of interest. The fact remains, however, that the two companies are separate and distinct corporations and that the Brooks-Scanlon Company has at no time operated the railroad. The order of the Louisiana Railroad Commission and the Louisiana Supreme Court was, not that the Kentwood & Eastern Railway Company should continue to operate the road, but that the Brooks-Scanlon Company, a corporation which was not authorized to run it, and which had never operated it, should go to large expense and begin to operate it.

### III.

On the last page of its opinion, the Supreme Court of Louisiana says:

"Plaintiff offered testimony only as to the earnings of the railroad, of one branch or department of its business. **THIS SHOWED A LOSS.** But the test of whether plaintiff's property would be taken without compensation by compelling it to perform and assume public duty is the net results from the whole enterprise. The evidence should show net results from the entire business of the corporation and not the results of only a branch or department of that business. One branch of a business might always be operated at a loss while the entire business would be profitable."

In order to refute this statement, it is necessary only to recite the facts. As stated *supra* the Brooks-Scanlon Company acquired a large saw mill, together with certain timber and acquired incidentally and accidentally this little narrow guage road. The Supreme Court of Louisiana, as we read its decision, has held that before the Brooks-Scanlon Company could get relief from the order of the Railroad Commission of Louisiana commanding it to operate the narrow guage road, it would be necessary for that company to show not only that the narrow guage road was being operated at a loss but also that its entire saw-mill business was being operated at a loss. This contention is not supported by either reason or authority. This Court dealt with and decided adversely a very much narrower contention of the same general character when in the case of the *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 595, it said:

"In such a case it would be no answer to say that the carrier obtained from its entire intrastate busi-

ness a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus in *Lakeshore & Michigan Southern R. Co. v. Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *M. R. Ry. Co. v. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build more private connections, and the adequacy of its receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the state's protective power."

Bear in mind that in that case this Court was dealing with the entire business of a carrier and it held that a carrier was entitled to relief against a rate which made it carry a given commodity at a loss even though it might be making a profit upon its entire carrying business. In this case the Supreme Court of Louisiana has held that even though a narrow gauge railroad is shown to be operated as a whole at a loss, nevertheless a corporation which happens to own it can be compelled to operate it unless that corporation shows affirmatively that the results not only of the narrow gauge railroad business but also of all of its other business show a net loss. The fallacy of this doctrine, we think, is apparent.

#### IV.

On the last page of its opinion the Supreme Court of Louisiana says:

"Again the order of the Commission orders plaintiff to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost and at a profit for plaintiff."

A full answer to this *obiter* suggestion is to be found in the affidavit of the General Manager of the Kentwood & Eastern Railway Company which shows that under a minimum of expenditure, in fact with no expenditures at all for general maintenance, there was a loss.

#### V.

Finally, the Supreme Court of Louisiana says in the next to last paragraph of its opinion:

"Plaintiff has not petitioned the Railroad Commission to permit it to discontinue its business in railroading and until it has done so, and the Commission has acted, the courts are without jurisdiction of the matter. *State ex rel Tate v. Brooks-Scanlon Company*, 78 *Sou.* 847. The Kentwood & Eastern Railway Company has made such a request; but it is not nominally a party to this suit."

This statement was evidently made through inadvertence, and we call attention to it lest this Court might be misled by it. If the Court will refer to the Order of the Railroad Commission of Louisiana which is the subject of controversy herein, and which is attached hereto, it will find that that order itself begins:

"Proceeding on its own motion the Railroad Commission of Louisiana on June 4, 1918, issued



a notice to the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company \* \* \* \* \* to show cause why they each should not be required to forfeit and pay to the State the sum of not less than \$100.00 nor more than \$5,000.00 for discontinuing the operation of the narrow gauge railroad of the Kentwood & Eastern Railway Company between Hackley, Louisiana, and Kentwood, Louisiana, and to further show cause why freight and passenger service should not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or the Brooks-Scanlon Company, or their successors, agents or assigns",

and the Court will further find that in paragraph 4 (d) of the answer filed in the Court by the Railroad Commission of Louisiana that Commission says:

"\* \* \* \* The Railroad Commission of Louisiana on its own motion proceeded against the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company for violation of its orders by discontinuing the operation of its trains on the said Kentwood & Eastern railway between Kentwood and Hackley, Louisiana, and also served on the two said companies notices to show cause why either or both of the said companies should not operate continuously the said narrow gauge railroad between Kentwood and Hackley, Louisiana. The case before the Railroad Commission was regularly heard, documentary evidence and oral testimony introduced, and the case was submitted and after due consideration the Railroad Commission of Louisiana entered its Order No. 2228, herein contested, all of which facts are fully set forth in the transcript of the proceedings."

From the foregoing it conclusively and affirmatively appears by documents over the signature of the Railroad Commission itself that the Brooks-Scanlon Company was a party to a proceeding the purpose of which was to show cause why either it or the Kentwood & Eastern Railway Company should not operate the narrow guage track. In view of these admitted facts it is apparent that the finding of the Supreme Court of Louisiaaan above referred to is inadvertent.

For these reasons we respectfully submit that the petition for *certiorari* herein presented should be granted and that after due hearing the decision of the Supreme Court of Louisiana should be reversed and the decision of the 22nd Judicial District Court of Louisiana should be reinstated.

Respectfully submitted,

R. R. REID,  
J. BLANC MONROE,  
MONTE M. LEMANN,  
Attorneys for Petitioner.

June, 1919.



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No.  886

(6)

**The Supreme Court of the United States**  
**OCTOBER TERM, 1918.**

**BROOKS-SCANLON COMPANY,**  
Petitioner,

vs.

**RAILROAD COMMISSION OF LOUISIANA,**  
Respondent.

**In the Matter of Brooks-Scanlon Company Apply-  
ing for Writ of Certiorari.**

**Brief on Behalf of the Railroad Commission of  
Louisiana, Respondent, Opposing the  
Petition for Writ of Certiorari.**

**A. V. COCO,**  
Attorney General of Louisiana,  
**W. M. BARROW,**  
Assistant Attorney General,  
Attorneys for Railroad Commission of Louisiana, Respondent.

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No. 1052

# **The Supreme Court of the United States**

**OCTOBER TERM, 1918.**

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**BROOKS-SCANLON COMPANY,**  
Petitioner,

vs.

**RAILROAD COMMISSION OF LOUISIANA,**  
Respondent.

**In the Matter of Brooks-Scanlon Company Applying for Writ of Certiorari.**

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**Brief on Behalf of the Railroad Commission of Louisiana, Respondent, Opposing the Petition for Writ of Certiorari.**

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This suit is one of great importance to the State of Louisiana. An injunction, issued in the trial court, stands dissolved on bond. On appeal, the Supreme Court of Louisiana has ordered that the injunction so dissolved be reinstated. The petition for writ of certiorari to the Supreme Court of the United States has stayed the proceedings in the state court. In the meantime, the train service on the Kentwood & Eastern Railroad, which has been ordered continued by the Railroad Commission of Louisiana and sustained by the Supreme Court of Louisiana, is not being furnished, and the public served by the Kentwood & Eastern Railroad is denied necessary transportation.

On the face of the record it plainly appears that the judgment of the highest court of the State of Louisiana is such that



it would be the duty of this court to grant a motion to affirm as soon as it is made in proper form.

It is, therefore, considered appropriate and necessary to a prompt disposition of this case that respondents oppose the granting of the writ of certiorari as prayed for by petitioner, since writs of error to state courts have never been allowed as of right.

*Spies, ex parte*, 123 U. S. 67, 31 L. ed. 80.

*Re Kemler*, 136 U. S. 436, 437, 34 L. ed. 519.

## I

### STATEMENT.

The Kentwood & Eastern Railroad, located entirely within the State of Louisiana, runs between Kentwood, Tangipahoa Parish, and Hackley, Washington Parish, through an intervening agricultural territory well settled, and served for the most part by no other railroad. The railroad is 29.82 miles long, and portions of it were built more than twenty years ago. The entire railroad has been operated as a common carrier of passengers and property for more than sixteen years, and since the year ending June 30, 1903, annual reports of its operations have been continually filed with the Railroad Commission of Louisiana. Portions of the railroad have been exempted from taxation under laws of Louisiana exempting railroads built within certain periods from taxation for a term of ten years.

In about the year 1900 a regular passenger and freight service was established and freight and passengers were carried to and from regular stations located along the line. There was no interruption in the service until April 21, 1918, when the Kentwood & Eastern Railway Company discontinued operating trains because of the cancellation of its lease by the Brooks-Scanlan Company.

The Constitution of 1898 of the State of Louisiana provided

for a Railroad Commission, to which was entrusted extensive regulatory powers over railroads operated within the State of Louisiana. (Articles 284 to 289, inc., Const. of Louisiana, 1898 and 1913.)

Article 284 of the Constitution of Louisiana of 1898 provides that:

“Art. 284. The power and authority is hereby vested in the commission, and it is hereby made its duty, to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, steamboat and other water craft, sleeping car, express, telephone and telegraph lines of this state, and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance over the same line, unless authorized by the commission to do so in special cases; to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations, and to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction.

“The commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and to hear and determine complaints that may be made against the classification or rates it may establish, and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts, required or authorized by these provisions. The Commissioners shall have power to summon and compel the attendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under commission, and to punish for contempt as fully as is provided by law for the district courts.”

In 1907, an amendment was adopted to the Constitution of 1898, Article 286, in which the powers and duties of the Railroad Commission of Louisiana were enlarged.

The last sentence of the amended article is as follows:

“The power and authority of the commission shall affect and include not only the transportation of passengers, freight, express matter, and telegraph and telephone messages between points within this State, and the use of such instruments within this State, but shall also affect and include all matters and things connected with and concerning the service to be given by railroad, express, telephone, telegraph, steamboat and other water craft, and sleeping car companies, and corporations in the State, and their operations within the State.”

Under the authority derived from the Constitution of the State of Louisiana, and the amendments thereto, the Railroad Commission of Louisiana, in February, 1912, A. D., adopted a rule and regulation, governing all railroads operating in the State of Louisiana, to prevent the abandonment of passenger trains without its consent.

The rule and regulation is as follows:

“No passenger trains operating in the State of Louisiana shall be discontinued without the consent of the Commission.”

On January 29, 1918, the Kentwood & Eastern Railway Company, lessee of the Kentwood & Eastern narrow gauge railroad, gave notice to the public that it would “discontinue service over the narrow gauge railroad track running from Kentwood, Louisiana, to Hackley, Louisiana, after April 21, 1918, its lease on said railroad track having been cancelled and terminated by the owners thereof.” The owner of the railroad was the Brooks-Seanlon Company, petitioner.

Shortly after this notice was given to the public, the State of Louisiana, on the relation of C. M. Tate, and others, filed a

petition for an injunction against the Brooks-Scanlon Company, petitioner, and the Kentwood & Eastern Railway Company, to restrain and prohibit the two defendants from abandoning, taking up, removing or doing away with any part of the railroad track owned by the Brooks-Scanlon Company, and leased by it to the Kentwood & Eastern Railway Company, and further prohibiting the abandonment or discontinuance of trains and giving service as had been given in the past, between Kentwood and Hackley, its termini. *State ex rel Tate vs. Brooks-Scanlon Co., et al.*, 143 La. 539.

Exceptions were filed in the State District Court, by the defendants, Brooks-Scanlon Company and Kentwood & Eastern Railway Company, on the ground that the court was without jurisdiction *ratione materiae*, as the relators had not first applied to the Railroad Commission of Louisiana and obtained action on their application, and on the further ground that only the district court of the domicile of Baton Rouge, Louisiana, the domicile of the Railroad Commission of Louisiana, had the power and authority to review any order made by the said Commission. The exceptions being overruled, defendants applied to the Supreme Court of the State of Louisiana for writs of certiorari and prohibition addressed to the district court. The writs were allowed, and in disposing of the case, *State vs. Brooks-Scanlon Co., supra*, the Supreme Court of Louisiana said:

“The matter and thing here presented for decision affects and includes the service to be given the public by the defendant railroad companies *and the operation of a railroad within the State.* (Our italics.)

(2) It is a matter exclusively within the jurisdiction of the Commission, and the decision of that body thereon is subject to review at the suit of the railroad affected by the decision, in the district court at the domicile of the Commission, and in the Supreme Court on appeal. Const. Art. 285.

It is only after the Commission has acted that the court may be appealed to.”

Discussing the powers of the Railroad Commission of Louisiana over railroads in the State of Louisiana, in the same case, the Court says:

"It is contended that the Railroad Commission is without power to prohibit common carriers from dissolving or totally abandoning their properties; that the Commission may in a case before it determine a reasonable rule; and that rule or order must, if contested, be reviewed by the courts, and enforced, if upheld, that it may control the railroads while in operation, but that it has no authority to prevent them from going out of business; that the courts must determine the question whether these defendants shall operate a railroad owned by them, before the Commission can exercise the authority to regulate and control the service.

But, defendants are operating a railroad, and the Commission may exercise its authority to regulate and control the service thereof. To it is given the power and authority not only affecting and including the transportation of passengers, freight, etc., but of all matters and things connected with and concerning the service to be given by railroads, steamboats, etc., and their operations within the state."

The Court then cites the case of *Railroad Commission of Louisiana vs. Kansas City Southern Railway Co.*, 111 La. 133, 35 South. 485, in which it was held that:

"The power to 'regulate' carried with it full power over the thing subject to regulation. Here the Constitution has placed the railroad and its appurtenances under the authority of the Commission."

With the jurisprudence of the State of Louisiana thus firmly established as to the jurisdiction and powers of the Railroad Commission of Louisiana, the Commission proceeded on its own motion to investigate the failure of the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company to operate the Kentwood & Eastern railroad between Kentwood and Hackley, Louisiana, and to allow the two interested companies to

show cause why the service should not be continued.

The investigation made by the Railroad Commission of Louisiana, in which all parties were accorded a full hearing, resulted in the adoption by the Commission of its Order No. 2228, dated August 5, 1918, which, leaving out the reasons upon which it is founded, is as follows:

“ORDERED, That no fine be imposed in these proceedings, in view of the circumstances and confusion surrounding the case. It is further

ORDERED, That the Brooks-Scanlon Company, either directly or through arrangements made with the Kentwood & Eastern Railway Company, shall operate its narrow gauge line of railroad between Kentwood, Louisiana, and Hackley, Louisiana, by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the Commission, the said Brooks-Scanlon Company, or its lessee, to prepare and submit to the Commission for its approval, without delay, a time table showing the schedules upon which it is proposed to operate such trains. It is further

ORDERED, That the rates which were formerly in effect over the narrow gauge railroad between Kentwood and Hackley when operated by the Kentwood & Eastern Railway shall be, and are hereby, reinstated, with 25% added, the minimum carload charge to be \$15.00 per car. It is further

ORDERED, That all orders and authorities in conflict herewith be, and the same are hereby, declared cancelled, rescinded and annulled.”

(NOTE: For the convenience of this Court, the order is printed in this brief as a supplement.)

On the 19th day of August, 1918, the Brooks-Scanlon Company, petitioner, filed its suit in the Twenty-Second Judicial District Court, Parish of East Baton Rouge, State of Louisiana, contesting this order on various grounds. The Railroad Commission of Louisiana answered and reconvened, asking for an injunction restraining the Brooks-Scanlon Company from discontinuing its trains and tearing up and abandoning its tracks,

which was granted, and later dissolved on plaintiff's furnishing bond for \$75,000.00. The case then went to trial and was decided against the Railroad Commission of Louisiana. On appeal to the Supreme Court of Louisiana, the decision of the trial court was reversed, and an application for rehearing was refused. Respondent was then notified by petitioner of its intention to apply to this court for a writ of certiorari.

## II

### FEDERAL QUESTIONS INVOLVED.

In its original petition in the state court, the following federal question is involved:

Whether the order of the Railroad Commission of Louisiana requiring the Brooks-Seanlon Company to operate a common carrier railroad which it purchased as a going concern, when such operation would entail a loss, amounts to depriving petitioner of its property without due process of law, in violation of Article V and Section 1 of Article XIV of the amendments to the Constitution of the United States.

### THE FACTS AS FOUND BY THE SUPREME COURT OF THE STATE OF LOUISIANA.

The Supreme Court of Louisiana found that the "Kentwood & Eastern Railway was among the property transferred by the Brooks-Seanlon Lumber Company to the Brooks-Seanlon Company. It, the railroad, was a going concern, a carrier, engaged in transporting passengers and freight, express and mails. All of its privileges were exercised under the authority and protection of the Interstate Commerce Commission and the Railroad Commission of Louisiana, and all of these privileges had been continued to be exercised until about the time of filing this suit."

The Brooks-Seanlon Lumber Company was organized in Minnesota in 1901. The incorporators of the two companies, Brooks-

Scanlon Company and The Brooks-Scanlon Lumber Company, were about the same persons. The Brooks-Scanlon Lumber Company acquired the property and belongings of the Banner Lumber Company, as a common carrier, in the year 1905. And the Brooks-Scanlon Company operated the road as a common carrier for a short time in 1906. It was organized on February 17, 1906.

The Brooks-Scanlon Company, or its incorporators, after it had acquired the business and railroad of the Brooks-Scanlon Lumber Company, caused the Kentwood & Eastern Railway Company to be organized, and it became the lessee of the roadbed, including the ties and rails of the railroad, and the purchaser of the rolling stock of the road. The Brooks-Scanlon Company assumed the position of lessor, and the Kentwood & Eastern Railway Company became the lessee of the railroad in 1906. Since that time the road has been operated in the name of the Kentwood & Eastern Railway Company.

The Kentwood & Eastern Railway Company, a Louisiana corporation, was organized December 5, 1906, with a capital stock of \$100,000.00. Four of its incorporators were holders of \$99,400.00 of the stock, and were four of the five individual incorporators of the Brooks-Scanlon Company. The two companies (Kentwood & Eastern Railway Company and Brooks-Scanlon Company) were, to all intents and purposes, the same corporation.

The Supreme Court of Louisiana further supports its decision with liberal citations from the testimony taken before the Interstate Commerce Commission December 13th to 15th, 1910, which testimony is in the record.

The Banner Lumber Company, the original owner, builder, and operator of the Kentwood & Eastern Railroad, was a Louisiana corporation. It sold its holdings, including its railroad and rolling stock, to the Brooks-Scanlon Lumber Company in 1905.

The Supreme Court of Louisiana further found:



"Plaintiff is admittedly a corporation, engaged in business in the State of Louisiana, and, as such, is amenable to the laws of the State. It is the owner of a railroad bed, including cross-ties and rails, which it acquired with its sawmill and lumber business, which road had been operated by two of its predecessors in the same business; it operated the road in connection with its business for a short time, when it entered into a contract of lease with the Kentwood & Eastern Railway Company, and assumed the role of lessor. The lessee was a subordinate or affiliated corporation, or an interlocking corporation with the plaintiff, the incorporators of one being the stockholders of the other."

It is further found that petitioner's charter gave it the right to combine the business of railroading and the manufacture and transportation of lumber of all kinds; that a railroad is a very necessary appliance for the accomplishment of a large timber plant, which was one of the purposes of the plaintiff corporation.

It is found that there is a necessity for the continuance of the operation of the railroad for the transportation of passengers, freight, mail and express matter; that, while the railroad operated as one branch or department of petitioner's business, showed a loss, there was no evidence to show the results from the whole enterprise. *The order of the Railroad Commission of Louisiana* orders plaintiff to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for the plaintiff.

The Supreme Court of Louisiana finally finds that the plaintiff, Brooks-Seanlon Company, has not petitioned the Railroad Commission of Louisiana to permit it to discontinue its business of railroad, and until it has done so, and the commission has acted, the courts are without jurisdiction of the matter.

The above are the substantial findings of fact upon which the Court must consider the petitioner's application for a writ of certiorari.

Hedrick vs. Atchison, etc., R. Co., 167 U. S. 673; 42 L. ed. 320.

Atchison, etc., R. Co. vs. Mathews, 174 U. S. 96; 43 L. ed. 909.

Backens vs. Fort St. Union Depot Co., 169 U. S. 557; 42 L. ed. 853.

Egan vs. Hart, 165 U. S. 188; 41 L. ed. 680.

In re Buchanan, 158 U. S. 31; 39 L. ed. 884.

Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226; 41 L. Ed. 979.

Missouri, etc., R. Co. vs. Haber, 169 U. S. 613; 42 L. ed. 878.

### III

#### POINTS DECIDED BY THE SUPREME COURT OF LOUISIANA.

The decision below is adverse to petitioner, Brooks-Scanlon Company, upon several independent grounds, several of which are not federal questions.

(1) The Supreme Court of Louisiana holds that: "It is settled that the Commission\* may prevent the removal or abandonment of a railroad which is in use and in which the public has an interest. R. R. Com. vs. Kansas City R. R., 111 La. 133, 35 South. 487; Gates vs. Boston & N. Y. R. R., 53 Conn, 333, 342."

(2) "Plaintiff is admittedly a corporation, engaged in business in the State of Louisiana; and, as such, it is amenable to the laws of the State."

(3) The Kentwood & Eastern Railroad Company was a subordinate or affiliated corporation, or an interlocking corporation with the Brooks-Scanlon Company, petitioner.

(4) The contract of lease between the Brooks-Scanlon Company and the Kentwood & Eastern Railroad Company did not operate a discharge of plaintiff, Brooks-Scanlon Company, continuing its services of a common carrier on its railroad.

(5) The Revised Statutes of Louisiana, as amended by Act

No. 154, 1902, p. 288, permit the combination of railroad and the manufacture and transportation of lumber of all kinds in one charter.

(6) The charter of the Brooks-Scanlon Company gave it the right to combine the two businesses of railroad and manufacture and transportation of lumber.

(7) It is evident that the Brooks-Scanlon Company so construed its charter when it bought the railroad and the sawmill business from its predecessor.

(8.) The Brooks-Scanlon Company owns the stock together with the franchise and all belongings of the railway company.

(9) The test of whether plaintiff's property would be taken without compensation by compelling it to perform an assumed public duty, is the net result from the whole enterprise.

(10) The order of the Railroad Commission of Louisiana requires petitioner to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for plaintiff.

(The order of the Railroad Commission also permits substantial advances in freight rates.)

(11) The Brooks-Scanlon Company has not petitioned the Railroad Commission to permit it to discontinue its business of railroad, and until it has done so, and the Commission has acted the courts are without jurisdiction.

When it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error.

Eustice vs. Bolles, 150 U. S. 361; 37 L. ed. 1111, 1113.

Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556; 40 L. ed. 536.

Murdock vs. Memphis, 20 Wall. 590; 22 L. ed. 429.

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\*Railroad Commission of Louisiana.

Adams County vs. B. & M. R. R. Co. 112 U. S. 123; 28 L. ed. 678.

De Saussure vs. Gaillard, 127 U. S. 216; 32 L. ed. 126.

Hopkins vs. McLure, 133 U. S. 380; 33 L. ed. 442.

Blount vs. Walker, 134 U. S. 607; 33 L. ed. 1036.

Johnson vs. Risk, 137 U. S. 300; 34 L. ed. 683.

Beauhn vs. Noyes, 138 U. S. 397; 34 L. ed. 991.

Hammond vs. Johnston, 142 U. S. 73; 35 L. ed. 941.

Yesler vs. Washington Harbor Line Com., 146 U. S. 646; 36 L. ed. 1119.

Sulurger vs. McCormick, 175 U. S. 274; 44 L. ed. 161.

Giles vs. Teasley, 193 U. S. 146; 48 L. ed. 655.

Allen vs. Argminbau, 198 U. S. 149; 49 L. ed. 990.

Leathe vs. Thomas, 207 U. S. 93; 52 L. ed. 118.

In a clear case when a motion to discuss or affirm would be granted, the writ of certiorari has been denied, and this practice has been followed in a number of cases, cited later on in this brief.

#### IV

#### A FEDERAL QUESTION IS NOT RAISED IN TIME TO GIVE THIS COURT JURISDICTION WHEN PRESENTED FOR THE FIRST TIME IN A PETITION FOR REHEARING.

After judgment had been rendered by the Supreme Court of Louisiana on March 3, 1919, the Brooks-Scanlon Company applied for a rehearing, and in paragraphs 13, 14 and 21 of its petition for rehearing, which was denied, raised for the first time the question of the validity of the order of the Railroad Commission in controversy, on the ground that it impaired the obligation of the contract existing between the Brooks-Scanlon Company and the State of Louisiana, by virtue of its charter, in violation of Article 1, Section 10, paragraph 1 of the Federal Constitution.

In the petition for writ of certiorari presented to this Honorable Court by the Brooks-Seanlon Company, it is again urged as ground for granting the writ that the enforcement of the order of the Railroad Commission of Louisiana will divest petitioner of vested rights and impair the obligation of its contract in derogation of the Constitution of the United States, particularly Amendments 5 and 14 and article 1, section 10, paragraph 1.

Since the impairment of contract clause of the Federal Constitution was invoked for the first time in the petition for rehearing in the lower court, filed after judgment was rendered, the question is not raised so as to give this court jurisdiction.

*Johnson v. N. Y. L. Ins. Co.*, 187 U. S. 586, 47 L. ed. 273.

In the case of *Forbes v. State Counsel of Virginia*, 216 U. S. 396, 399, 54 L. ed. 534, 535, Mr. Justice Day, delivering the opinion of the court, says:

“It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.”

The exception to the rule is when the court entertains and passes upon the Federal question so raised, which the Supreme Court of Louisiana did not do in this case.

The only Federal question properly presented to the lower court, and passed upon by it, is the question whether the order of the Railroad Commission of Louisiana, requiring the Brooks-Seanlon Company to operate train service on the Kentwood & Eastern narrow gauge railroad, which it owns, amounts to taking its property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

## ARGUMENT.

The validity of the articles of the Constitution of the State of Louisiana creating and defining the powers and duties of the Railroad Commission of Louisiana, on the ground of repugnancy to the Constitution of the United States, has not been called into the question.

The exercise of authority by the Railroad Commission of Louisiana in adopting its order in controversy is attacked on the ground that it is repugnant to articles V and XIV of the Amendments to the Federal Constitution. Article V was not intended to limit the powers of state governments in respect to its own people, but to operate on the National Government alone. *Ex Parte Spies*, 123 U. S. 131, 31 L. ed. 80.

Mr. Chief Justice Waite, in delivering the opinion in *Ex Parte Spies*, referring to the first ten amendments to the Federal Constitution, says:

“That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since.”

The only remaining federal question passed upon by the lower court is whether the State of Louisiana has deprived the petitioner of its property without due process of law in violation of the Fourteenth Amendment.

It is also contended that the order of the Railroad Commission of Louisiana in controversy exceeds the limitations placed upon state power by the Fourteenth Amendment in that the property of the petitioner is taken without due process of law.

It is, therefore, necessary to examine the opinion of the lower court on this point, since it alone affords the sole basis for the

claim that a Federal question sufficient to give this court jurisdiction has been determined.

Petitioner contends that the right of which it has been deprived by the order of the Railroad Commission of Louisiana is that a state cannot compel a carrier to transport all of its traffic at a loss, and if the net return from all of its traffic shows a certain loss the state cannot compel the carrier to operate at all, and if the carrier cannot operate at all without a loss and cannot be compelled to operate at all, then the carrier has a right to take its property out of public use entirely and devote it to its private business.

This is the summing up in the brief filed by petitioner of the Federal question arising under the Fourteenth Amendment, which is presented for examination by the Court, and if this Federal question has been decided properly by the Supreme Court of the State of Louisiana, then this Court will refuse the writ as there is no error to justify the Court in bringing this case here for review.

The finding by the Supreme Court of the State of Louisiana that the Brooks-Scanlon Company, petitioner, has not shown a loss in the operation of its entire business, including its railroad, and that the order of the Railroad Commission of Louisiana in controversy permits a rearrangement of schedules which will greatly lessen the cost of operation, and the further fact that the order of the Railroad Commission of Louisiana permits advances in freight rates over those previously in effect, sufficiently answer the contention which is raised by petitioner. The order of the Railroad Commission of Louisiana, and the facts upon which it is based, being a part of the record, are subject to examination by the court.

The order of the Railroad Commission of Louisiana sets forth fully the conditions surrounding the operations of the Kentwood & Eastern Railroad. The Brooks-Scanlon Company was receiving a rental of \$10,000 a year payable in monthly in-

stallments from the Kentwood & Eastern Railway Company at the time it cancelled its lease, and this lease was to run for a period of 20 years from 1906.

It was the Brooks-Scanlon Company that cancelled the lease with the Kentwood & Eastern Railway Company, thus depriving itself of the fixed money rental of \$10,000 a year which it was receiving up to April 21, 1918.

The Brooks-Scanlon Company owned the necessary equipment to operate the railroad at the time it confirmed the lease with the Kentwood & Eastern Railway Company, made by its predecessor, the Brooks-Scanlon Lumber Company, and sold this equipment to the Kentwood & Eastern Railway Company. If the money received from the sale of the equipment by the Brooks-Scanlon Company is reinvested in equipment for the operation of the railroad the situation will be as it was when the Brooks-Scanlon Company leased its railroad and sold its equipment to the Kentwood & Eastern Railway Company.

The Brooks-Scanlon Company has put itself in the position where it is necessary to purchase new equipment. It has by its own act and without authority from the Railroad Commission of Louisiana attempted to renounce its duty to the public and to disable itself from performing it.

The corporation engaged in the operation of a common carrier railroad cannot dispose of its property and franchise without legislative authority. *York & Maryland Line R. Co. vs. Winans*, 17 How. 30, 15 U. S. (L. ed.) 27; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 U. S. (L. ed.) 950; *Central Transp. Co. vs. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 U. S. (L. ed.) 55; *Earle v. Seattle etc. R. Co.*, 56 Fed. 909; *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. 640, 75 C. C. A. 442; *Georgia R. etc. Co. v. Haas*, 127 Ga. 187, 9 Ann. Cas. 677, 56 S. E. 313, 119 Am. St. Rep. 327; *Kelley v. Forney*, 80 Kan. 145, 101 Pac. 1020; *Brunswick Gas Light Co. v. United Gas etc. Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; *Rich-*



ardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston etc. R. Co., 115 Mass. 347; Weld v. Gas etc. Com'rs., 197 Mass. 556, 84 N. E. 101; Black v. Delaware etc. Canal Co., 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130; Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767, 32 LRA (NS) 848; Coe v. Columbus etc. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Susquehanna Canal Co. v. Bonhan, 9 Watts. & S. (Pa.) 27, 42 An. Dec. 315; Naglee v. Alexandria etc. R. Co., 83 Va. 433, 3 S. E. 369; 5 Am. St. Rep. 308; Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901.

In the case of *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950, Mr. Justice Miller states the principle as follows:

“That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy.”

The expenditure of money is necessary in the giving of public service by a common carrier, but as it was said by the Supreme Court in the recent case of *Chicago & Northwestern Railroad Co. v. Ochs*, decided April 14, 1919:

“As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the public. *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 595, 59 L. ed. 735, 741, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. To do this requires an expenditure of money, of course, but the expenditure is for property which

will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the transportation of persons and property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore, an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense."

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 302, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 278, 279, 54 L. ed. 472, 479, 480, 30 Sup. Ct. Rep. 330; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 529; Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 631, 59 L. ed. 750, 756, P.-U. R. 1915C, 263, 35 Sup. Ct. Rep. 422; Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234.

## VI

### A RAILROAD OPERATED AS A COMMON CARRIER CAN- NOT DISCONTINUE WITHOUT THE CONSENT OF THE STATE.

The Supreme Court of the State of Louisiana has held:

"It is settled that the Commission may prevent the removal or abandonment of a railroad which is in use and in which the public has an interest." (Opinion, Sup. Ct. of La., this case.)

If this question is correctly settled by the Supreme Court of the State of Louisiana, then the writ of certiorari in this case should not issue. The weight of the jurisprudence sustains the decision of the Supreme Court of Louisiana.

In the case of *York & Maryland Line R. R. Co. vs. Winans*, 17 How. 31, 15 L. ed. 27, Mr. Justice Campbell, who delivered the opinion of the Court, said, after stating the case:

"This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its rights to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed and corporate responsibility for their insufficiency provided, as a remuneration to the community and their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature. *Beman vs. Rufford*, 1 Simon N. S. 550; *Winch vs. B. & L. Ry. Co.*, 13 L. & E. 506."

In *Eel River R. R. Co. vs. State*, 155 Ind. 456, 57 N. E. 396, it is held that the surrender of the property and franchises of a railroad, under lease in perpetuity, is ground for forfeiture of the franchise.

In *State vs. Dodge City, etc., Ry. Co.*, 53 Kan. 379, 42 Am. St. Rep. 296, 36 Pac. 748, it is held that a roadbed of a railway built under charter from a state cannot be diverted from a purpose to which it was devoted.

In *St. Louis vs. St. Louis Gas Light Co.*, 5 Mo. App. 530, it is held that a corporation intrusted with a public franchise cannot part with it under any guise.

In *Black vs. Delaware, etc., Canal Co.*, 22 N. J. Eq. 399, the rule is stated that a corporation cannot lease or alienate any franchise or property necessary to perform its duties to the state without legislative authority.

In *James vs. Western, etc., R. R. Co.*, 121 N. C. 528, 28 S. E.

538, it is held that the sale of a railroad under second mortgage does not extinguish the corporation's existence, nor relieve it from liability to the public for the manner in which it is operated.

In *Russell vs. Texas, etc., R. R. Co.*, 68 Texas 652, 5 S. W. 690, it is held that a railroad has no power to transfer its franchise without legislative permission.

The Supreme Court of the State of Louisiana has held that railroads operating within the State of Louisiana cannot be done away with or abandoned without consent of the Railroad Commission. *R. R. Com. of La. vs. K. C. S. Ry. Co.*, 111 La. 133; *State ex rel Tate vs. Brooks-Scanlon Company*, 143 La. 539.

In *Railroad Commission of Louisiana vs. K. C. S. Railway Company, supra*, the Court says:

"The word 'regulate' has a broad meaning. We think it includes the power to see to the maintenance of the main track and all its switches and spurs as they were at the time of taking charge, and the power to prevent any change when reasonably, in public interest, no change should be made." \* \* \* \* \*

"When a change is to be made along the line—a switch or spur to be removed—the commission should be consulted, and its consent obtained.

"The power to regulate carries with it full power over the thing subject to regulation. Here the Constitution has placed the railroad and its appurtenances under the authority of the commission.

"This, we understand, was the view taken by the courts in passing upon words in the interstate commerce act of similar import to those in our Constitution regarding railroads and their management, placed under a commission in accordance with the requirement of the interstate commerce act. The broadest meaning is given to the words 'govern' and 'regulate.' *Am. & Eng. Enc. of Law, verbo, 'Interstate Commerce.'* It follows the thing to be regulated includes main line and side track already laid.

"The switches and spur in use are part of the railroad system. If they can be removed without the consent of the commission why should not the railroad company have equal right to change the direction of the

main track entirely, without consulting and obtaining the consent of the commission? We cannot see why one should be considered, under the commission, to 'regulate' and the other not. The spur forms part of the main line subject to regulation.

"The power to regulate authorizes appropriate order to maintain the property in the condition of use in which it should be kept; that is, in a safe and useful condition.

"The intention, we take it, in authorizing the commission to 'regulate' and 'govern'—words of the organic law—was to invest the commission with sufficient authority to prevent the railroad from taking down and doing away with any part of its road."

In the recent case of *State ex rel Tate et al. vs. Brooks-Scanlon Company*, *supra*, the Supreme Court again states, but in even stronger language, the principle announced in the *Kansas City Southern* case, *supra*. In defining the powers and duties of the Commission to prevent the abandonment of a railroad, the Court says.

"It is contended that the Railroad Commission is without power to prohibit common carriers from dissolving or totally abandoning their properties; that the commission may in a case before it determine a reasonable rule; and that rule or order must, if contested, be reviewed by the courts, and enforced, if upheld; that it may control the railroads while they are in operation, but that it has no authority to prevent them from going out of business; that the courts must determine the question whether these defendants shall operate a railroad owned by them, before the commission can exercise the authority to regulate and control the service.

"*But, defendants are operating a railroad*, and the commission may exercise its authority to regulate and control the service thereof. To it is given the power and authority, not only affecting and including the transportation of passengers, freight, etc., but of 'all matters and things connected with and concerning the service to be given by railroads, steamboats, etc., and their operations within the state.'" (Our italics.)

The "defendants" referred to in the above decision were the Brooks-Scanlon Company and the Kentwood & Eastern Railway

Company, lessor and lessee of the Kentwood & Eastern narrow gauge railroad, which is the railroad in controversy in this proceeding.

These decisions by the Supreme Court of the State of Louisiana leave nothing in doubt as to the power of the Railroad Commission of Louisiana to prevent the discontinuance or abandoning of a common carrier railroad in the State of Louisiana without its consent, as interpreted by the state court.

There is complete harmony between the federal and state jurisprudence on this subject.

The power of the Legislature of a state to make laws for and prescribe regulations governing the manner in which the corporations in the state shall be organized, conducted, and dissolved is unquestioned. *Freeport Water Company vs. Freeport*, 180 U. S. 587, 45 L. ed. 697.

It has been held by the Supreme Court of the United States that there is nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with other property of the corporation. *New Orleans, Spanish Fort & Lake R. R. Co. vs. Delamore*, 114 U. S. 501, 29 L. ed. 244.

In the case cited, the Court says:

“The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale and to transfer them with the other corporeal property to the purchaser. It could not be held that, when a mortgage on a railroad and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchise.”

In *People vs. Louisville, etc., R. Co.*, 120 Ill. 48, 10 N. E. 657, it is held that a railway company is bound to construct its road to and from the several points named in its charter, to run trains over its line in such manner as to afford reasonable facilities for the prompt and efficient transaction of such legitimate

business as may be offered to it on any and every part of its road; and this obligation is equally binding on its successors. No part of the road can be abandoned without rendering its franchises liable to forfeiture.

"A purchaser of a railroad under foreclosure is also bound to perform the duties to the public which are coupled with the enjoyment of the corporate privileges and which the original company owed to the public, such as the duty of properly constructing, repairing, equipping, and operating the road." 33 Cyc. 591. *New York, etc., R. Co. vs. State*, 50 N. J. L. 303; 13 Atl. 1 (affirmed in 53 N. J. L. 244; 23 Atl. 168).

In the case of *International Great Northern Railroad Company vs. Anderson County*, 246 U. S. 424, 62 L. ed. 807, the Supreme Court reversed on writ of error a decree of the Sixth Supreme Court of the Civil Appeals of the State of Texas, affirming a decree of the District Court of Cherokee County, enjoining the removal of machine shops, round houses and general offices of a railway company. From the voluminous assignments, the Supreme Court summed up the contention as follows, viz.:

"That the state court is without jurisdiction because of certain foreclosures in the courts of the United States, that the judgment disregarded the rights secured by the decree of those courts, and that it gave effect to a statute which, as applied, burdened interstate commerce, impaired the obligations of contracts, etc., and was contrary to Article I, Sections 8 and 10, and to the Fourteenth Amendment to the Constitution of the United States."

In disposing of the case, Mr. Justice Holmes, who delivered the opinion of the court, said:

"Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the court of the United States, it would not take away the power of the state court

to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. *Ricaud vs. American Metal Co.* (March 11, 1918, 246 U. S. 304, ante. 733, 38 Sup. Ct. Rep. 312.)

"But the foreclosures did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary courts. Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine—it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. *But if the law made that requirement, it hardly matters whether the remote reason for it was a contract or a general motion of public policy.* The state courts hold that when the law on any ground fixes the place of the offices and shops, the obligation is indelible by foreclosure. We see no reason why their decision should not prevail." (Our italics.)

## VII

REQUIRING A CORPORATION OWNING A RAILROAD WHICH HAS BEEN OPERATED AS A COMMON CARRIER OF PASSENGERS AND FREIGHT THROUGH SUCCESSIVE OWNERSHIPS FOR OVER SIXTEEN YEARS TO PERFORM A DUTY OWED THE PUBLIC OF OPERATING TRAINS, DOES NOT DEPRIVE THE OWNER THEREOF OF THE PROPERTY WITHOUT DUE PROCESS OF LAW.

The fundamental question in this case is whether the Supreme Court of Louisiana has correctly decided that the State of Louisiana may, through authority delegated to the Railroad Commission of Louisiana, control and regulate the railroads operating within the state in such a manner as to prevent the discontinuance of service and the abandonment of the railroad without the consent of the Commission. The question presents the secondary proposition whether a corporation which owns and operates a railroad has received exemptions from taxation, and has profited



by all the benefits derived from its operations as a common carrier, may, at a time when its properties have passed into the hands of others, arbitrarily and in complete disregard of the state laws, close up its business as a railroad.

These propositions are both negatively answered by the decisions of the Supreme Court of the United States, in many cases, and with an unbroken line of decisions by state courts wherever the questions have been presented.

Thus it has been held in *Cotting vs. Godard*, 183 U. S. 79, 46 L. ed. 92, that individuals and corporations who have devoted their property to a use in which the public have an interest are subject to the state's power to regulate their charges for service.

In the case of *Missouri Pacific Railway Company vs. Kansas*, 216 U. S. 462, 54 L. ed. 473, the right of the state to direct a railway company operating a branch line which, so far as it lies within the state, was built under the authority of the charter from that state, to afford passenger train service between the terminus of such line within the state and the state line, is upheld.

The Supreme Court of the State of Kansas sustained as reasonable an order of the Railroad Commission of Kansas directing the putting in operation of the passenger train service between Madison, Kansas, and the Missouri-Kansas state line, on what is known as the Madison Branch of the Missouri Pacific Railway Company. It was contended, among other things, that the order and judgment of the state court on the evidence and facts found, deprived the railroad company of its property without due process of law and without just compensation, and denied to it the equal protection of the law. The case came to the Supreme Court of the United States on writ of error.

The present Chief Justice, who delivered the opinion of the court in the Kansas case, *supra*, said:

“We say this because, when the controversy here presented is properly analyzed, the first and pivotal question

arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission, supra.*"

In *Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission*, 206 U. S. 1, 26, 27, 51, L. ed. 933, cited at length by the Chief Justice, in the Kansas case, *supra*, it is said:

"As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident some pecuniary loss from rendering such service may result." \* \* \* \*

"As the duty to furnish necessary facilities is co-terminus with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporation business as a whole, the character of the service required, and the public need for its performance."

In the final analysis, the order of the Railroad Commission as sustained by the Supreme Court of the State of Louisiana merely requires the performance of an obligation which is the result of the purchase of a common carrier railroad by the Brooks-Seanlon Company. The obligation to operate the railroad was fully recognized in the lease which was made between the Brooks-Seanlon Company and the Kentwood & Eastern Railway Company, but as was said by the Supreme Court of Illinois in *People ex rel. Cantrell vs. St. Louis A. & T. H. R. Co.*, 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292, and quoted approvingly by

the Supreme Court of the United States in *Missouri P. R. Co. vs. Kansas, supra*:

“Independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers no less than as a carrier of freight.”

The decisions which we have cited leave no further question as to the validity of the order of the Railroad Commission of Louisiana in requiring the Brooks-Scanlon Company to operate the minimum service at advanced rates on the Kentwood & Eastern Railroad, and the correctness of the decision of the Supreme Court of Louisiana upholding the order.

### VIII

#### UNDER THE LAWS OF THE STATE OF LOUISIANA THE CHARTER OF THE BROOKS-SCANLON COMPANY PERMITS IT TO OPERATE A RAILROAD:

Petitioner contends that the Brooks-Scanlon Company's charter does not permit it to operate a railroad. Its contention is based upon its present interpretation of its charter and is directly contrary to the construction which it placed upon its charter when it purchased the Kentwood & Eastern narrow gauge railroad and leased it to an operating company, so that its operations might not be interrupted.

The Supreme Court of the State of Louisiana has directly held that the laws of the State of Louisiana permit the combination of railroad and the manufacture and transportation of lumber of all kinds in one charter, and that the charter of the Brooks-Scanlon Company gave it the right to combine the two businesses in that section, which read in part:

“The general nature of its business shall be to manufacture, buy, sell and deal in timber, logs, lumber, building materials and other personal property; to buy, sell, hypothecate, own and hold stock in other corporations; also to buy, own, lease, mortgage, sell, deal in and improve any real estate wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the corporation.”

Since the Supreme Court has thus interpreted its own Constitution and laws no error involving a Federal question is presented for review by this court.

## IX

### A CORPORATION MAY ENGAGE IN A BUSINESS WHICH IS REASONABLY NECESSARY OR INCIDENTAL TO THE BUSINESS EXPRESSLY AUTHORIZED BY ITS CHARTER. THE STATE MAY SO HOLD, WITHOUT DECIDING A FEDERAL QUESTION.

*Jacksonville, Mayport & Pablo R. & Nav. Co. vs. Hooper*,  
160 U. S. 514, 40 L. ed. 515.

*Wheeler vs. San Francisco & A. R. Co.*, 31 Calif. 46, 89  
Am. Dec. 147.

*Lyndeborough Glass Co. vs. Massachusetts Glass Co.*, 111  
Mass. 315; *Brown vs. Winnisimmet Co.*, 11 Alen 326.

*Malone vs. Lancaster Gas Light & Fuel Co.*, 182 Pa. St.  
309, 37 Atl. 932.

*Searight, Thornton & Co. vs. Payne*, 6 Lea 283.

*Dauchy vs. Brown*, 24 Vt. 197.

*Flanagan vs. Great Western Ry. Co.*, L. R. 7 Eq. 116.

In the case of *Jacksonville, Mayport & P. R. & Nav. Co. vs. Hooper*, *supra*, Mr. Justice Shiras, with great clearness, discusses the incidental or auxiliary powers of corporations, and in announcing the opinion of the court, cites numerous authorities in support of the doctrine which has been followed by the Su-

preme Court of Louisiana in the case in which the writ or certiorari is now asked.

The question involved in the Hooper case, *supra*, was whether the Jacksonville, Mayport & Pablo Railroad & Navigation Company, as an incident to its main business as set out in its charter, was authorized to lease and operate a hotel. The court held that the transaction was incidental or auxiliary to the main purpose for which the corporation was organized, and therefore within its power, and legal. Mr. Justice Shiras cites the case of *Attorney General vs. Great Eastern R. Co.*, L. R. 5 App. Cas. 478, in which Lord Chancellor Shelborne, after declaring his sense of the importance of the doctrine of *ultra vires*, said:

“This doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.”

In the same case, *Jacksonville, etc., vs. Hooper, supra*, the court cites approvingly the case of *Davis vs. Old Colony R. Co.*, 131 Mass. 258, 272, 41 Am. Rep. 221, quoting the following from the decision:

“We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created.”

*The question whether the corporation has exceeded its powers as defined by its charter concerns only the state within whose limits the property is situated.*

“It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so.”

Fritz vs. Palmer, 132 U. S. 282, 32 L. ed. 317.

Cowell vs. Colorado Springs Co., 100 U. S. 55, 60, 25 L. ed. 547.

Jones vs. Habersham, 107 U. S. 174, 188, 27 L. ed. 401, 406.

The Supreme Court of Louisiana has applied this rule in former cases.

Southern Lumber Co. vs. Holt, 129 La. 273.

As the petitioner, Brooks-Seanlon Company, urges as a grounds for granting the writ or certiorari that its charter does not permit it to operate a railroad, we cite these authorities in contravention thereof. The decision of the lower court that the charter of petitioner gave it the right to combine the two businesses of railroading and the manufacture and transportation of lumber of all kinds, and, that the question whether in operating a railroad the petitioner is violating its charter rests with the Attorney General, do not present federal questions so as to justify this court in ordering the record sent up for review.

The Supreme Court of the State of Louisiana having interpreted its own constitution and laws, its decision upon such state of facts raises no federal question.

In the case of Turner vs. Board of Commissioners, 173 U. S. 461, 43 L. ed. 768, Mr. Justice Peckham, delivering the opinion of the court, says:

“But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because this being a writ of error to the state court, we cannot take jurisdiction over the allegation that a contract has been impaired by a decision of

that court, when it appears that the state court has done nothing more than construe its own Constitution and statutes existing at the time the bonds were issued, there being no subsequent legislation touching the subject. We are, therefore, bound by the decision of the state court in regard to the meaning of the Constitution and laws of its own state, and its decision upon such a state of facts raises no federal question."

## X

### CONCLUSION.

The decision of the Supreme Court of Louisiana is so thoroughly in accord with the decisions of this court that a motion to affirm would be granted upon the authorities cited, as well as upon the sound reasoning of the opinion of the lower court, and, therefore, we respectfully pray that the motion and petition for a writ of error filed herein be denied.

Respectfully submitted,

A. V. COCO,

Attorney General of Louisiana,

W. M. BARROW,

Assistant Attorney General,

Attorneys for Railroad Commission of Louisiana, Respondent.

**Erratum.**—Page 32. The last clause in the "CONCLUSION" should read as follows: "We respectfully pray that the motion and petition for a writ of certiorari filed herein be denied," instead of as it appears in the brief.

# SUPPLEMENT

## "RAILROAD COMMISSION OF LOUISIANA. (Order No. 2228.)

RAILROAD COMMISSION OF LOUISIANA

*versus*

No. 2778.

THE KENTWOOD & EASTERN RAILWAY COMPANY

*and*

THE BROOKS-SCANLON COMPANY.

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*In re Operation of Narrow Gauge Railroad Between Kentwood,  
Louisiana, and Hackley, Louisiana.*

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Proceeding on its own motion, the Railroad Commission of Louisiana, on June 4, 1918, issued a notice to the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company, the former a Louisiana corporation and the latter a Minnesota corporation doing business in the State of Louisiana, both domiciled at Kentwood, Louisiana, to show cause why they each should not be required to forfeit and pay to the State the sum of not less than One Hundred (\$100.00) Dollars nor more than Five Thousand (\$5,000.00) Dollars, for discontinuing the operation of the narrow gauge railroad of the Kentwood & Eastern Railway Company between Hackley, Louisiana, and Kentwood, Louisiana; and to further show cause why freight and passenger service should not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or the Brooks-Scanlon Company, or their successors, agents or assigns.

Both companies, in due course, filed answers to the rule, and the case was assigned for hearing at Baton Rouge on June 25, 1918.

At the hearings on June 25 and 26 evidence was introduced on behalf of the Commission and the defendants, and after a full investigation the matter was taken under advisement. The substantial facts are as follows:

The Banner Lumber Company was incorporated under the laws of the State of Louisiana by notarial act dated August 16, 1895, for the purpose of manufacturing, buying and selling lumber and merchandise. This company built a narrow gauge railroad between Kentwood and Hackley, which it used for hauling its lumber and logs. The testimony of witnesses living at Mount Herman, Louisiana, show that the Kentwood & Eastern Railroad carried passengers and freight for hire almost from the beginning of its operation, and the records of the Commission show that about the year 1903 the Kentwood & Eastern Railroad made reports to the Railroad Commission of Louisiana covering



its operations, the said reports bearing the notation "Owned and Operated by the Banner Lumber Company." Its operation as a common carrier was continuous, and the road was used by the public almost from its initial operation. On the first day of November, 1905, the Brooks-Scanlon Lumber Company, a Minnesota corporation, purchased from the Banner Lumber Company its timber holdings and the Kentwood & Eastern Railroad. The Brooks-Scanlon Lumber Company continued the operation of the Kentwood & Eastern Railroad for the period from November 1, 1905, until December 1, 1905, when the Kentwood & Eastern Railway Company was incorporated, and assumed the expenses and earnings of the railroad from November 1, 1905. The Brooks-Scanlon Lumber Company, however, conducted all of the operations during the period from November 1, 1905, to December 5, 1905. On December 5, 1905, the Kentwood & Eastern Railway Company did not sell the roadbed and track, or the equipment, to the Kentwood & Eastern Railway Company, but, under a verbal lease, arranged for the operation of the Kentwood & Eastern Railroad by the Kentwood & Eastern Railway Company, the Kentwood & Eastern Railway Company agreeing to lease and operate the railroad and purchase the equipment.

In February, 1906, the Brooks-Scanlon Company was organized, and took over all of the property acquired by the Brooks-Scanlon Lumber Company from the Banner Lumber Company, including the narrow gauge railroad and its equipment and rolling stock, the latter—that is, the equipment and rolling stock—subject to the agreement made between the Brooks-Scanlon Lumber Company and the Kentwood & Eastern Railway Company.

The agreement between the Brooks-Scanlon Lumber Company and the Kentwood & Eastern Railway Company was a verbal agreement, and it was stated by witnesses familiar with the agreement that the Brooks-Scanlon Lumber Company agreed to sell the rolling stock and equipment of the narrow gauge railroad to the Kentwood & Eastern Railway Company, and to lease the railroad to the Kentwood & Eastern Railway Company for a period of twenty (20) years, at a rental of \$10,000.00 per annum, payable in monthly installments. A written lease was ultimately executed in accordance with the verbal lease. This lease contained a stipulation that either party might terminate the same upon giving six months written notice to the other.

About February, 1906, the Kentwood & Eastern Railway Company began the construction of a standard gauge railroad and continued the operation of its narrow gauge railroad under the terms of the lease above referred to.

The principal traffic over the narrow gauge railroad was the hauling of timber and logs. The public along the line used it

continuously. Investments were made in properties along the right of way, land values increased, and the country through which the narrow gauge railroad operated showed a marked development.

In the summer of 1917 the lumber and timber began to diminish, but the interest of the public living along the railroad in having adequate transportation facilities was considerable. In October, 1917, the Brooks-Scanlon Company, for reasons known to itself, and divulged to the Commission at the hearing, served notice on the Kentwood & Eastern Railway Company of the cancellation of the lease at the end of six months time. The attorneys for the Kentwood & Eastern Railway Company consulted the Railroad Commission and, after receiving writter notice of a session to be held in the City Hall at New Orleans on January 22, 1918, appeared at that hearing and stated to the Commission that the Kentwood & Eastern Railway Company had been notified by the Brooks-Scanlon Company of the cancellation of the lease, and that it intended to discontinue operations after complying with such rules as the Commission might have on the subject. After consulting its counsel the Commission notified the attorneys for the Kentwood & Eastern Railway Company as follows:

"Relative to your statement concerning the discontinuance of the Kentwood & Eastern Railway Company, I beg to advise that the matter was considered by the Commission, and I was instructed to say to you that under the circumstances it would only be necessary for you to file formal notice of the proposed discontinuance in writing with the Commission. Notice should also at once be given the public. Further than this there are no requirements by the Commission."

Pursuant to this notice, the Kentwood & Eastern Railway Company published and posted at points along the narrow gauge railroad the following notice:

#### "NOTICE TO THE PUBLIC.

"KENTWOOD, LOUISIANA, JANUARY 29, 1918.

"Notice is hereby given that the Kentwood & Eastern Railway Company will discontinue service over the narrow gauge railroad track running from Kentwood, Louisiana, to Hackley, Louisiana, after April 21, 1918, its lease on said railroad track having been cancelled and terminated by the owners thereof."

The Kentwood & Eastern Railway Company subsequently, on February 4, 1918, requested authority from the Commission to cancel its intrastate local and joint rate, and the authority

was granted.

The Kentwood & Eastern Railway Company shows that for some periods of time it made a profit out of the operation of the narrow gauge railroad, and has at all times made a profit out of the operation of the entire properties other than the leased narrow gauge line.

After notice was filed, and on or about the twenty-second day of April, 1918, the Kentwood & Eastern Railway Company discontinued operating trains on the narrow gauge track between Kentwood and Hackley, and the Brooks-Scanlon Company made no provision for a continuation of the service. Complaints were then made to the Commission that the service had been discontinued, but no action was taken by the Commission until the issuance of the notice in this case, for the reason that the Commission was advised by its counsel, and believed that it had no jurisdiction in the matter of determining which of the two corporations should operate the Kentwood & Eastern Railway, that being the subject of a suit filed by the State of Louisiana on the relation of C. M. Tate and others, against the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company, in which the State obtained an injunction to prevent the discontinuance of the service over the narrow gauge railroad. The case went to the Supreme Court on an exception to the jurisdiction of the court, and the Supreme Court of Louisiana, in a very concise opinion, on May 27, 1918, in the case of "State of Louisiana ex rel. C. M. Tate, et al., vs. Brooks-Scanlon Company and Kentwood & Eastern Railway Company," held that "the matter and things presented for decision affects and includes the service to be given the public by the defendant railway company and the operation of a railroad within the State. It is a matter exclusively within the jurisdiction of the Commission, and the decision of that body thereon is subject to review at the suit of the railroad affected by the decision in the District Court at the domicile of the Commission, and in the Supreme Court on appeal. (Const., Art. 285.) It is only after the Commission has acted that the court may be appealed to."

Prior to this decision of the Supreme Court the Commission had proceeded upon the belief that it was without jurisdiction to determine which of the two companies owed the duty of operating the railroad, which had previously, for many years, been engaged in the business of a common carrier. As soon as the Supreme Court rendered its decision the Commission, as stated, instituted, on its own motion, these proceedings.

It was shown at the hearing that there is substantial traffic over the narrow gauge railroad of the Kentwood & Eastern Railway, and a considerable body of the public is dependent upon this line for transportation.

The letter and authorities which have been referred to heretofore are said by the defendants in this case to constitute orders or authorities on the part of the Commission to discontinue the railroad. Such is not the case. The Railroad Commission has never acted upon any application to discontinue the railroad further than to advise the Kentwood & Eastern Railway Company that it had no rules to prevent its discontinuance. Our letter addressed to the attorney of the Kentwood & Eastern Railway Company was simply a disclaimer of jurisdiction.

On February 9, 1918, the chairman of the Commission addressed a letter to Mr. C. M. Tate, Mount Herman, Louisiana, in which the position of the Commission is made clear, and it is as follows:

"February 9, 1918.

"Hon. C. M. Tate,

Mount Herman, Louisiana:

"DEAR SIR:—With further reference to our correspondence concerning the proposed discontinuance of operations on a certain portion of its line from Kentwood to Hackley by the Kentwood & Eastern Railway Company, I beg to enclose you herewith a copy of an opinion received this morning by the Commission from its counsel, Hon. W. M. Barrow, Assistant Attorney General. You will note that Mr. Barrow, after having carefully considered this matter, advised the Commission that it is without power or authority to interfere with the discontinuance of this line of railroad. Were the Commission vested with power in the premises I assure you that every effort would be made to assist the people and communities affected, but, under the circumstances, it appears that there is nothing to be done.

"Deeply regretting my inability to be of service to you, I am,

"Very truly yours,

(Signed) "SHELBY TAYLOR,

"Chairman."

After the railway company notified the Commission of its intention to discontinue its operations, the Commission allowed the cancellation of the tariffs in effect so as to prevent confusion in shipments. But this was far from determining that the railroad company might discontinue its operations to the great inconvenience and discomfort of the public it served.

We are of the opinion, and hold, that the Kentwood & Eastern Railway is an important transportation facility, serving a public dependent upon it exclusively for its transportation, and that the discontinuance of this line would result in an unnecessary burden and unusual hardship on the public. The Brooks-

Scanlon Company, while contending that its charter does not permit it to operate a railroad, loses sight of the fact that its officers and owners owned a railroad for a number of years; and that they bought this railroad as a going concern from another company which operated as a common carrier railroad; that from its organization until April 20, 1918, the railroad was operated without interruption, at all times serving the public and participating in both local and joint through rates. The Brooks-Scanlon Company, in order to provide for the operation of the railroad, leased it to the Kentwood & Eastern Railway Company, but we do not believe that this in any sense relieved the Brooks-Scanlon Company from its obligations to operate the Kentwood & Eastern narrow gauge railroad.

\*While operated by the Kentwood & Eastern Railway Company, the Kentwood & Eastern Railroad exercised the power of eminent domain. It has always contended that it was important to the territory it served, having insisted before the Interstate Commerce Commission in the Tap Line Case that it was a full-fledged common carrier, serving a thickly settled territory, to and through which it was an important artery of commerce. The Commission cannot give its consent to the discontinuance of the operation of this railroad, and while in view of the circumstances, a fine does not at this time seem warranted, the Brooks-Scanlon Company will be required to operate the Kentwood & Eastern Railroad. Nothing in the charter of the Brooks-Scanlon Company prevents this from being done.

In the lease between the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company the following is the opening paragraph:

"Whereas, the party of the first part (Brooks-Scanlon Company) is the owner of a certain line of narrow gauge railroad in the State of Louisiana extending from Kentwood to the Parish of Tangipahoa in said Louisiana, known as the Kentwood & Eastern Railway Company."

This, in itself, is sufficient to establish the fact that the Brooks-Scanlon Company is the real owner of the Kentwood & Eastern Railroad.

In the charter of the Brooks-Scanlon Company it is provided that "the general nature of its business shall be to manufacture, buy, sell, and deal in timber, logs, lumber, building materials, and other personal property; also to buy, own, lease, mortgage,

---

\*The Commission has corrected this statement as follows: "While operated by the Kentwood & Eastern Railway Company, the Kentwood & Eastern Railroad did not exercise the power of eminent domain." (Tr., Vol. 1, p. 32.)

sell, deal in, and improve any real estate wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the corporation."

This language is broad enough to include the operation of a railroad, if such railroad is necessary or proper for the accomplishment of the purposes of the Brooks-Scanlon Company.

Even, however, if there be doubt as to the right of the Brooks-Scanlon Company to operate a railroad under its charter, with which conclusion we do not agree, still, nevertheless, the fact remains that the individuals owning the Brooks-Scanlon Company have in their possession a common carried railroad, and owe a continuing duty to the public. The premises considered, it is

ORDERED, That no fine be imposed in these proceedings, in view of the circumstances and confusion surrounding the case. It is further

ORDERED, That the Brooks-Scanlon Company, either directly or through arrangements made with the Kentwood & Eastern Railway Company, shall operate its narrow gauge line of railroad between Kentwood, Louisiana, and Hackley, Louisiana, by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the Commission, the said Brooks-Scanlon Company, or its lessee, to prepare and submit to the Commission for its approval, without delay, a time table showing the schedules upon which it is proposed to operate such trains. It is further

ORDERED, That the rates which were formerly in effect over the narrow gauge railroad between Kentwood and Hackley when operated by the Kentwood & Eastern Railway shall be, and are hereby, reinstated, with 25% added, the minimum carload charge to be \$15.00 per car. It is further

ORDERED, That all orders and authorities in conflict herewith be, and the same are hereby, declared cancelled, rescinded and annulled.

BY ORDER OF THE COMMISSION.

BATON ROUGE, LOUISIANA, August 5, 1918.

SHELBY TAYLOR, Chairman.

B. A. BRIDGES,

JOHN T. MICHEL, Commissioners.

HENRY JASTREMSKI, Secretary.

Attest: A true copy:

HENRY JASTREMSKI, Secretary."



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No. **5** **286**

**UNITED STATES SUPREME COURT**

**OCTOBER TERM 1918.**

**BROOKS-SCANLON COMPANY,**

**Petitioner,**

**versus**

**RAILROAD COMMISSION OF LOUISIANA,**

**Respondent.**

**In the Matter of Brooks-Scanlon Company Applying for  
Writ of Certiorari.**

**Supplemental Memorandum of Authorities on Behalf of  
Brooks-Scanlon Company, Petitioner.**

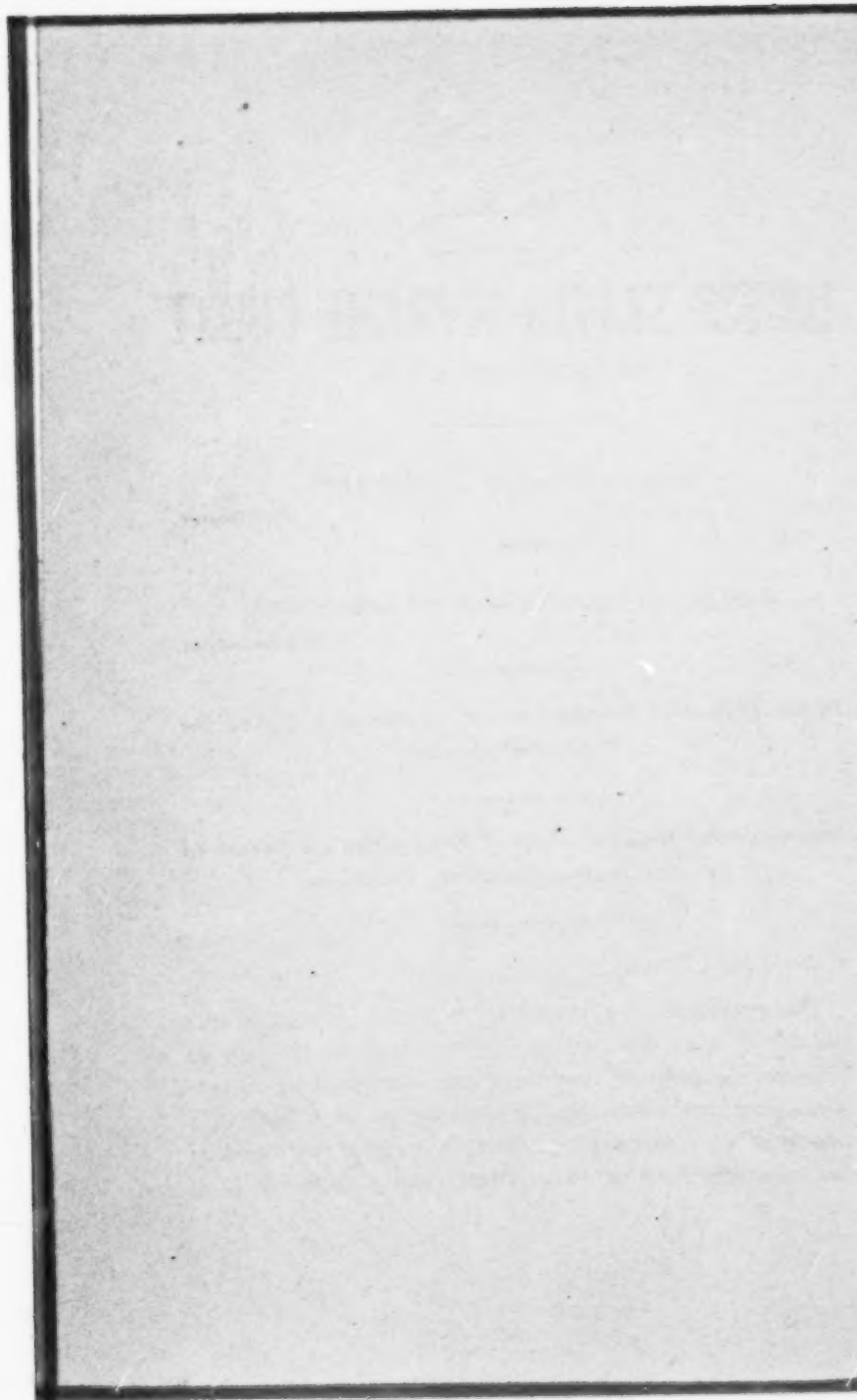
**R. R. REID,  
J. BLANC MONROE,  
M. M. LEMANN,**

**Attorneys.**

**June 2, 1919.**

**E. P. Andree Ptg. Co., 516 Natchez St., New Orleans, La.**





No. 1052

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**UNITED STATES SUPREME COURT**

OCTOBER TERM 1918.

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**BROOKS-SCANLON COMPANY,**  
Petitioner,

*versus*

**RAILROAD COMMISSION OF LOUISIANA,**  
Respondent.

---

**In the Matter of Brooks-Scanlon Company Applying for  
Writ of *Certiorari*.**

---

**Supplemental Memorandum of Authorities on Behalf of  
Brooks-Scanlon Company, Petitioner.**

---

*If the Court Please:*

The gravamen of our contention in this matter is that the action of a State, acting either directly or through its Railroad Commission, in compelling a railroad to operate when such operation must necessarily be at a loss, is a taking of the Company's property without due process of law, a confiscation of its property, and a denial to it of

the equal protection of the law in contravention of the Constitution of the United States. In our original brief we cited a number of cases decided by this Court and by the inferior Federal Courts bearing upon the matter. Since that brief was written, we have found the following additional cases:

252 Fed. 530 *Central Bank & Trust Corporation et al. v. Cleveland et al.*

This case was decided by the Circuit Court of Appeals of the Fourth Circuit, on July 19, 1918, Circuit Judges Knapp and Woods and District Judge Smith sitting. The case came up on an appeal from an order appointing a co-receiver to the Greenville & Western Railway Co., and directing the Receivers to issue Receiver's certificates not to exceed \$3000.00, and to use the proceeds in repairing the road bed so that trains might be operated. Certain outsiders, residents along the railroad, who were discommoded by its non-operation, intervened and asserted the right of the public to have the railroad operate it. The Court said:

"The logical consequence of their contention is that the effect of subscribing to the capital or lending on the application of a railroad company and its construction therewith is to subject all the property of the corporation to a first lien to the State for the indefinite operation of the road, and although its operation may prove to be unprofitable and at a loss, the owners of the property or the holders of securities secured by a lien upon the property, cannot cease operation and realize on the security, but

they are bound to continue the operation of it, even to the entire exhaustion of the assets of the railroad.

"Upon this point the controversy is between all the persons who have any financial interest in the property, on the one side, and on the other only the intervenors who have no financial interest in the property but claim the right, on behalf of the public, to compel the operation of the railroad upon the theory that in the case of a railway the public has a right to compel its operation even if the result be the sequestration of the entire amount invested, without compensation to the owners. This Court has authoritatively declared its view to be the contrary of this contention.

"A railroad was formerly constructed along the very line of the railroad now concerned. Its name was the Carolina, Knoxville & Western Railway Company. The operation of the railroad having proved unsuccessful, and that it could only be operated at a loss, foreclosure proceedings were instituted in the Circuit Court of the United States for the District of South Carolina, for foreclosure and sale, and a sale at auction was ordered. It was twice exposed for sale at auction without any bidders and it was finally bid in for \$15,000.00. The purchaser did not attempt to operate it, but sought to remove and sell the rails. Thereupon, a number of persons, relators, acting in the name of the State, just as in the present cause, intervened and sought to have the Court require the rails taken up and sold to be replaced by the purchaser and the road to be operated.

"The case came on to be heard before Judge Simonton sitting in the Circuit Court. The very point was made that is made in the present case, that under the statute of the State of South Carolina, referred to in the order of the learned Judge below, slightly modified as embodied in Section 3117 of the Code of Laws of South Carolina, the purchaser of a railroad was required to organize and put it in operation within sixty days from the purchase and acquisition thereof, and that that meant that the stockholders accepted an obligation to maintain and operate and keep on operating, although the operation was at a loss. After a full hearing Judge Simonton decided to the contrary. *Jack v. Williams*, 113 Fed. 823. He held that while a railroad was in a sense a public concern, for whose construction and operation the action of the sovereign was needed yet whilst thus serving the public no corporation or person is thereby bound to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. He decided, further, that the effect of the Act of the Legislature referred to was not to forfeit or sequester the property of a railroad company to the use of the public by requiring its operation even at a loss **but only that if the purchasers did not organize and operate within the time limited they forfeited the franchises of the railroad corporation.** The State could not compel the stockholders to exhaust their assets in the operation of a losing concern, but it could say that if you do not choose to operate you shall not be entitled to the public franchises given to a common carrier; and in that

case the only thing left to the owners of the property would be to sell the property without being able at the sale of the property to sell the franchises and the right of operation

"That decision was appealed from but was affirmed by this Court. *State of South Carolina v. Jack*, 145 Fed. 281. This Court affirmed the judgment of Judge Simonton and the only question would be whether it be so that it be established that the road cannot be operated except at a loss to the owners. This Court further held in that case that the very fact that the road does not pay the expenses of running trains was persuasive evidence that the service to the public did not require it to be kept in operation. The learned Judge below in the present cause, in his order, finds as a conclusion of fact that the railroad has lost money from the beginning, but voices his belief that notwithstanding previous losses the Receiver should issue a sufficient amount of Receiver's certificates to put the railroad in condition to run trains over it, and that the interest of the public made this service imperative, and that he is bound to believe that such service would be equally beneficial to bondholders."

\* \* \* \* \*

"This does not mean, however, in these cases, that the Courts have a right to require an indefinite operation to the exhaustion of the assets, but that in view of the fact that the public utility corporation has been created and exists, the Court will take it for granted that it can be operated so as not at least further to impair the value of the assets, and will direct it to be operated even by the issue of Re-

ceiver's certificates until arrangements can be made to meet the exigencies; if it should be found that it cannot be operated except at a loss, it would be open to the public, if it be authorized as a public measure, to condemn the property and take it for public purposes at its ascertained value, **but it cannot take it by the method of requiring its operation to the absolute exhaustion of the assets and in that way effect the taking of private property for public purposes without compensation."**

\* \* \* \* \*

"The present case, however, does not fall in any of these categories. In the first place, it is a small branch railroad and it is not the public as a general whole which is affected, but only the limited number of individuals who are connected with the neighborhood of a small branch railroad. Next, the facts show that it is unreasonable to expect this railroad to be operated so as to pay its cost of operation, except as a speculative hope. The only grounds upon which expectations are based that it can be operated so as not to entail further loss by the operating expenses being greater than the operating receipts, is a speculative hope that business may be built up so as to have this result. This is not a conclusion based upon past operation, but a hope voiced upon speculative contingencies. The railroad therefore, is in the same position as the line referred to in the previous case, when it was ordered in the previous decree of this Court to be sold."

The above case is practically on all fours with the case at bar. Figures in the record show conclusively that the present railroad has been operated at a very ma-

terial loss, and by examining the figures it can easily be ascertained that even an increase of 25% in the receipts

**Insert at end of 1st paragraph, p. 7.**

Again, the testimony shows that the New Orleans & Great Northern R. R. is no great distance from Mt. Hermon on the Kentwood & Eastern Railroad. This is a standard gauge road leading directly to New Orleans, the principal shipping point from the vicinity. Any increase in rates on the Kentwood & Eastern Railroad, a narrow gauge road, would divert traffic to the standard gauge. Freight on the narrow gauge railroad must bear a transfer charge when delivered to a standard gauge road for transportation to New Orleans or other Southern points or to Northern points.

tion:

"Plaintiff offered testimony only as to the earnings of the railroad or one branch or department of its business. This showed a loss."

We think we are conservative, therefore, in saying that the present record absolutely demonstrates the fact that this little branch line of railroad cannot be operated except under a condition which will result in an actual excess of operating expenses over total income, that is to say, it can be operated only by taking daily and hourly from the owners of the property their money and using that money to operate the railroad for the benefit of the public. As all of the cases quoted in this brief and in the one previously filed coincide in holding that an order compelling a railroad to operate under such circumstances



is a violation of the Constitution of the United States because it constitutes a taking of the property of the railroad without compensation and without due process of law, we submit that we have clearly made a case for relief on the present record.

215 *Fed. 313, State of Iowa v. Old Colony Trust Co.*

This case was decided by the Circuit Court of Appeals for the Eighth Circuit, on April 1, 1914, Circuit Judges Hook, Adams and Smith sitting. The Court said:

"A railroad corporation is in an important sense a public corporation. It is dependent upon the public for its franchises to exist and carry on business, and in consideration of these franchises it assumes and must perform certain duties and obligations for the benefit of the public, among them, as a general rule, is the duty of maintaining its entire line of road in a reasonably safe and operative condition and for a fair consideration to carry passengers and freight over it at all reasonable times, whenever requested to do so. These propositions are elemental and lay down a general rule which cannot be gain-said or denied, but there are some conditions which necessarily excuse full compliance with the requirements of these rules, and, in our opinion, the present case affords a striking example of such conditions. Here is a case where the line sought to be abandoned is not only not self-supporting but its continued operation jeopardizes the successful operation of the entire system of which it is merely a part. Moreover, its continued operation in its present condition is dangerous to life and property, and there

is no money or financial ability to improve its condition. Not only so but there is little public necessity for its continued operation, whereas there is a great public necessity for the continued operation of the balance of the system.

"In such circumstances, the railroad company may abandon such an unprofitable and irreclaimable part of its road, and neither the State nor unfortunate investors along the line can justly complain. They cannot force a railroad company to do the impossible. *Jack v. Williams*, 113 Fed. 823; 145 Fed. 281; *Commonwealth v. Fitchburg R. R.*, 12 Gray (Mass.) 180; *People v. Albany and Vermont R. R. Co.*, 24 N. Y. 261; *Morowitz on Private Corporations*, 1119

192 Fed., 730, *New York Trust Co. v. Portsmouth & Exeter St. Ry. Co.*

The Court, speaking through Aldrich, District J., said:

"The authorities upon this question are not numerous, but such cases as *Jack v. Williams*, 113 Fed. 823, and the same case in 145 Fed. 281, and *Ralston v. Dodge City R. R.*, 53 Kas. 329, indicate that the courts refuse to issue mandates to compel the operation of railroads which are totally insolvent, and where there is no possibility that conditions will be improved by continuing the road as a going concern.

"Some of the decisions base the refusal to compel owners to operate, under circumstances of great pecuniary loss which must result through repairs and continuance as a going concern, upon the ground that it would deprive the owners of their property without compensation, and, therefore, that

it is justifiable to order a receiver to dismantle the road and sell the material."

199 Mass. 400, *Stiles v. Citizens Electric St. Ry. Co.*

This case dealt with the right of a street railway to abandon a branch line. The Court, speaking through Mr. Justice Sheldon, in 1908, said:

"You may add that it would be difficult in the absence of statutory requirement to reach the conclusion that a street railway, with so small a capital and resources so limited as those shown here should be required to operate a branch line which is not an integral part of its main system and which has not sufficient patronage to meet its running expenses. If it were a steam railroad, it would not be required, under the decision in *Commonwealth v. Fitchburg R. R. Co.*, 12 Gray 180, to run passenger trains on such a branch; but in a case of a street railway which does not carry freight, this means the complete disuse of its tracks. Substantially, this rule was formed in *Sherwood v. Atlantic D. R. Co.*, 94 Va. 291, and in *Jack v. Williams*, 113 Fed. 823. See also *O. & M. R. R. Co. v. People*, 120 Ill. 200; *People v. Rome R. Co.*, 103 N. Y. 95. The general rule for such cases was stated by Gray, J., in *Northern Pacific R. Co. v. Washington*, 142 U. S. 492:

"If, as in *Union P. R. Co. v. Hall*, 93 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad at a continuous loss, it may be compelled to do so by mandamus; so if the charter requires the corporation to construct its road and to run its cars at a certain point at tide-water (as was held to be the case in *State v. Hart-*

*ford R. Co.*, 29 *Conn.* 538), that it had so constructed its road and used it for years, it may be compelled to continue to do so; and mandamus will lie to compel a railroad corporation to build a bridge in compliance with an express requirement of statute. *N. O. M. & T. R. Co. v. Mississippi*, 112 *U. S.* 12; *People ex rel Kimball v. Boston and A. R. Co.*, 70 *N. Y.* 569. But if the charter of a railroad corporation simply authorizes the corporation without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be renum-  
 water (as was held to be the case in *State v. Hart-  
 erative.*

182 *Ind.*, 73, *Union Trust Co. v. Curtis.*

The Supreme Court of Indiana, speaking through Chief Justice Cox, in 1914, said:

"While the cases on the question are not numerous, it has been held that in circumstances similar to those in which this railroad has fallen, the owner cannot be compelled to operate it at an actual loss. The duty of a railroad company to operate its road being deemed to be measured merely to meet the public wants and exigencies, if there is not a sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation. In such case, the Company may cease operating the road unless contrary to the express terms of the charter." Citing numerous authorities.

80 *W. Va.*, 661, *Moore v. Lewisburg R. R. Co.*

This case was decided by the Supreme Court of West Virginia in 1917. The Court, speaking through Mr. Justice Ritz, said:

"To say that a railroad corporation must continue its operation indefinitely, regardless of the consequences to the stockholders, would in effect in a case like this permit the entire exhaustion of the property by its use. It would be the taking of the private property of the Company for its use without compensation. There is no special provision in our statute for the dissolution of public service corporations. The provisions of law for the dissolution of private corporations generally must, therefore, apply if it is held that such corporation can dissolve at all. We are constrained to hold that when it appears to the stockholders of a public service corporation that its business cannot be operated except at a loss, and that a fair test has been made in order to determine this fact, they have authority to discontinue the business of such a corporation and surrender its franchise. (Quoting authorities.) Certainly a public service corporation is under no obligation to continue the service rendered by it to the public longer than the public interest demands such service, and it may be said that whenever the returns received by the corporation for the service rendered by it are insufficient to pay the expenses of furnishing the service, there has ceased to be a public demand for the service."

For the reasons stated in these well reasoned cases and those cases heretofore cited, we respectfully submit that the decision sought to be reviewed in this instance deprives

petitioner of its property without due process of law, in contravention of the Constitution of the United States and that, therefore, the writ of *certiorari* should issue herein.

All of which is respectfully submitted.

R. R. REID,  
J. BLANC MONROE,  
M. M. LEMANN,

Attorneys.



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# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1919**

**No. 386**

**BROOKS-SCANLON COMPANY, *Petitioner,***

***vs.***

**RAILROAD COMMISSION OF LOUISIANA**

**On Writ of Certiorari to the Supreme Court of  
of the State of Louisiana.**

**BRIEF AND ARGUMENT ON BEHALF OF RAILROAD  
COMMISSION OF LOUISIANA.**

**A. V. COCO,**

*Attorney General of Louisiana,*

**W. M. BARROW,**

*Assistant Attorney General,*

**Solicitors for Railroad  
Commission of Louisiana,  
Respondent.**





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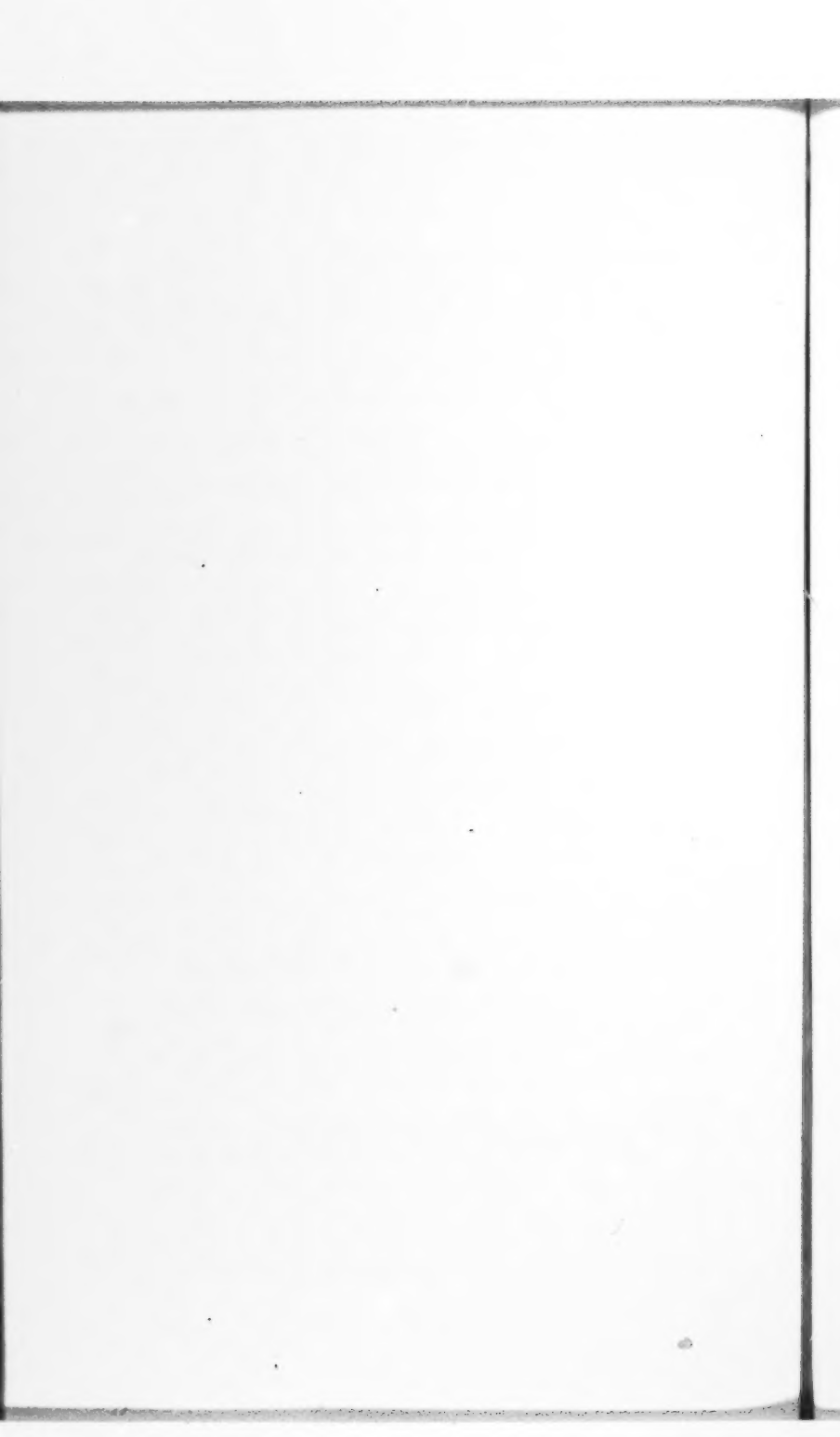
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 386

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BROOKS-SCANLON COMPANY, <i>Petitioner</i> ,	}
<i>vs.</i>	
RAILROAD COMMISSION OF LOUISIANA	

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On Writ of Certiorari to the Supreme Court of  
of the State of Louisiana.

BRIEF AND ARGUMENT ON BEHALF OF RAILROAD  
COMMISSION OF LOUISIANA.

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## I

### STATEMENT.

#### 1

This cause was instituted by Brooks-Scanlon Company, a Minnesota corporation, doing business in the State of Louisiana, against the Railroad Commission of Louisiana, in the Twenty-second Judicial District Court, Parish of East Baton Rouge, State of Louisiana, on the 19th day of August, 1918. The

petitioner sought to have an order of the Railroad Commission of Louisiana set aside as null and void. The order in controversy requires:

“Ordered, That the Brooks-Scanlon Company, either directly or through arrangements made with the Kentwood & Eastern Railway Company, shall operate its narrow gauge line of railroad between Kentwood, Louisiana, and Hackley, Louisiana, by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the Commission, the said Brooks-Scanlon Company, or its lessee, to prepare and submit to the Commission for its approval, without delay, a time table showing the schedules upon which it is proposed to operate such trains. It is further

Ordered, That the rates which were formerly in effect over the narrow gauge railroad between Kentwood and Hackley when operated by the Kentwood & Eastern Railway shall be, and are hereby, reinstated, with 25% added, the minimum carload charge to be \$15.00 per car. It is further

Ordered, That all orders and authorities in conflict herewith be, and the same are hereby, declared cancelled, rescinded and annulled.

By order of the Commission.

Baton Rouge, Louisiana, August 5, 1918.”  
(Order No. 2228, Railroad Commission of Louisiana. Tr. 4-9.)

The reasons upon which the order is founded are elaborately set forth in the findings of the Commission. (Tr. 4-9.)

The Railroad Commission of Louisiana, respondent, answered, and by way of reconventional demand, prayed for a prohibitory injunction restraining the removal or abandonment of any part of the railroad in controversy, and for a mandatory injunction requiring the replacing of any track removed. An injunction prohibiting the Brooks-Scanlon Company from taking up, removing or abandoning any part of its railroad was issued. The injunction was dissolved on bond. The Commission asked that the order dissolving the injunction be set aside and this was denied. (Tr. 41). The case was then tried on the merits and judgment was rendered in favor of the plaintiff, Brooks-Scanlon Company, petitioner. (Tr. 42). The Railroad Commission of Louisiana, the defendant, then took an appeal to the Supreme Court of the State of Louisiana from the judgment dismissing the rule to set aside the order dissolving the writ of injunction and from the judgment in favor of plaintiff declaring its order No. 2228 to be null and void. (Tr. 45). On motion, the case was advanced and tried by preference in the Supreme Court of the State of Louisiana on February 3, 1919, and on March 3, 1919, the court rendered its decision annulling, voiding and reversing the judgments appealed from,



restoring the injunction sued out by the defendant in reconvention, and ordering the suit dismissed at plaintiff's cost. (Tr. 51-57.) A petition for rehearing was filed, (Tr. 57), and after due consideration the rehearing applied for was refused. (Tr. 62). The application for a writ of certiorari was then filed in this court on May 29, 1919.

**Proceedings Before the Twenty-Second Judicial  
District Court, State of Louisiana.**

The case was tried in the Twenty-Second Judicial District Court, State of Louisiana, on the record as made up before the Railroad Commission, except that on the trial on the merits the defendant, the Railroad Commission of Louisiana, introduced evidence of several witnesses showing conditions in the territory along the Kentwood & Eastern Railroad and the demoralizing effect which followed the abandonment of service. (Tr. 30-41.)

A certified copy of the proceedings before the Commission was filed with the trial court by the Railroad Commission of Louisiana as required by Act No. 132 of the General Assembly of the State of Louisiana of 1914, 3 Marr's Ann. Rev. Stats. of La. 2139.

This act provides:

“That, whenever any suit is filed to contest any decision, act, rule, rate, charge, classification, or order of the Railroad Commission of Louisiana, as provided in the Constitution and laws of the State of Louisiana, the Secretary of the Commission shall, within fifteen days after the petition is served upon the Commission, cause a certified transcript of all proceedings had and testimony taken upon the investigation made by the Commission, to be filed with the Clerk of the Court in which the suit is pending.

Section 2. Be it further enacted, etc., That, if, upon the trial of any suit brought to contest any decision, act, rule, rate, charge, classification, or order, of the Railroad Commission of Louisiana, evidence shall be introduced by the plaintiff which is found to be different from that offered upon the hearing before the Commission, or additional thereto, the Court, before proceeding to render judgment, (unless the parties to such action stipulate in writing to the contrary), shall transmit a copy of such evidence to the Commission, and will stay proceedings in the said suit for fifteen days from the date of such transmission. Upon the receipt of such evidence, the Commission shall consider the same, and it may alter, modify, amend, or rescind its decision, act, rule, rate, charge, classification, or order, complained of in the said suit and shall report its action thereon to the said Court within fifteen days from the receipt of such evidence.

Section 3. Be it further enacted, etc., That, if the Railroad Commission of Louisiana shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify, or

amend the order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon, as though made by the Commission in the first instance. If the original order is not rescinded or changed by the Commission, judgment shall be rendered by the Court upon the original order."

No additional evidence was introduced on the court trial by the plaintiff. The court therefore proceeded to render judgment on the record as made up by the Commission.

### **Proceedings Before the Railroad Commission.**

When the case was heard before the Railroad Commission evidence was introduced on behalf of the public residing along the railroad and by witnesses representing the Kentwood & Eastern Railway Company and Brooks-Scanlon Company. Certified copy of the testimony taken before the Interstate Commerce Commission in the Tap Line case, 23 I. C. C., was filed as an exhibit by the Commission.

### **History of the Railroad, and its Present Status.**

The Kentwood & Eastern narrow gauge railroad runs between Kentwood and Hackley, entirely with-

in the State of Louisiana, in a northeasterly direction from Kentwood, where connection is made with the Illinois Central Railroad. It is 30.02 miles long, begun in about the year 1897 and completed in the year 1904, and was built by the Banner Lumber Company, a Louisiana corporation. (Tr. 70.) It was always known as the Kentwood & Eastern Railroad and almost as soon as it was completed was dedicated to public use by the operation of freight and passenger trains and performing all of the duties of a common carrier. (Tr. 95, 115, 122, 144).

On the 1st day of November, 1905, the Banner Lumber Company sold the Kentwood & Eastern Railroad to the Brooks-Scanlon Lumber Company. During the period from November 1, 1905, until December 5, 1905, the Brooks-Scanlon Lumber Company owned and its employees operated the Kentwood & Eastern Railroad, although accounts of the railroad operations were kept separate from those of the lumber company. (Tr. 162-163). On December 5, 1905, the Kentwood & Eastern Railway Company was incorporated, the stockholders of the company and the Brooks-Scanlon Company being identical, (Tr. 68), and, under a verbal lease with the Brooks-Scanlon Lumber Company, began operating the

Kentwood & Eastern narrow gauge railroad. Subsequently, the Brooks-Scanlon Company, a Minnesota corporation, purchased all of the holdings of the Brooks-Scanlon Lumber Company, including the Kentwood & Eastern narrow gauge railroad, and continued to carry out the verbal lease made by the Brooks-Scanlon Lumber Company of the Kentwood & Eastern narrow gauge railroad to the Kentwood & Eastern Railway Company. On July 1, 1906, the Brooks-Scanlon Company executed a written lease with the Kentwood & Eastern Railway Company. (Tr. 247-249). This lease describes specifically the railroad property leased by the Brooks-Scanlon Company to the Kentwood & Eastern Railway Company and included all "rights, privileges and franchises" of the Brooks-Scanlon Company necessary to the operation and management of its railroad and the business thereof. In the year 1918 officers of the Kentwood & Eastern Railway Company testified before the Interstate Commerce Commission in the Tap Line Case, and the testimony was introduced before the Railroad Commission of Louisiana in the proceedings before the Commission out of which this case originated. In this testimony it was shown that the Kentwood & Eastern Railroad was a common

carrier. (Tr. 66-89.) This testimony is reviewed in the opinion of the Supreme Court of Louisiana. (Tr. 54).

The Brooks-Scanlon Company for a certain period received compensation for the service it performed in hauling logs over its narrow gauge railroad to Kentwood, Louisiana, (Tr. 221, 222, 227), in the form of refunds. This compensation was paid under the following arrangement:

“The Brooks-Scanlon Company paid the Kentwood & Eastern Railway Company its local rate for hauling the logs into the mill, but viewed it as a milling-in-transit proposition, the Illinois Central Railroad taking the lumber made from these logs and moving it out and allowing the Kentwood & Eastern Railway Company 2.05 cents and 2 cents, depending on where the lumber went, I believe, out of the amount of the through rate; which reduced by that amount or to that extent the amount it originally paid under the local rates; and on the shipments moving out over the Illinois Central Railroad it amounted to a considerable sum of money; and the Illinois Central, after the decision in the Tap Line case, brought suit against the Brooks-Scanlon Company to recover that amount of money.” (Tr. 222).

The Brooks-Scanlon Company paid the local arbitrary rate into Kentwood, and on such lumber as moved out on through rate points they would appor-

tion the rebate and refund it. (Tr. 222). To make this point clear, we quote the following testimony of the General Manager of the Brooks-Scanlon Company as given before the Railroad Commission:

"Mr. Reed: Now, in the matter of this refund, will you explain exactly how it was handled? What did you pay the Kentwood & Eastern Railway Company, if anything, for hauling your logs to the mill?

Mr. Foley: We paid the local rate in on the logs.

Mr. Reed: Now, did you get any refund from anybody for that? I mean where the lumber was shipped to certain districts north of the Ohio River and east of the Mississippi River and west of Burlington, or do you know?

Mr. Foley: Yes, sir. We got a return of the division of the freight on the logs into the mill.

Mr. Reed: From whom?

Mr. Foley: The Kentwood & Eastern Railway Company.

Mr. Reed: Who did the Kentwood & Eastern get it from?

Mr. Foley: I presume from the Illinois Central Railroad." (Tr. 227).

The only theory upon which the Brooks-Scanlon Company could legally claim payment out of the through rate on logs hauled over the Kentwood & Eastern Railroad to the Illinois Central connection was that the Brooks-Scanlon Company performed a transportation service.

The leased property included its railroad "together with its terminals, tracks, side tracks, spur tracks, rights of way, all depots and depot grounds, culverts, viaducts, fences, bridges, station houses, engine houses, depot buildings, and all other buildings and structures of every kind connected therewith and belonging to said line of railroad used or acquired for use in connection therewith and all rights, privileges and franchises of the party of the first part necessary to the operation and management of said railroad and the business thereof for the period of twenty (20) years next ensuing from the date thereof, the party of the second part, its successors and assigns, yielding and paying therefor unto the party of the first part, its successors and assigns, a yearly rental of ten thousand (\$10,000) dollars, payable quarterly on the first days of January, April, July and October in each year of the continuance of this lease.

The terminals, depot grounds, rights of way, side tracks, spur tracks, engine houses and other structures, and the land occupied thereby and a reasonable amount of land contiguous thereto for railroad uses."



In addition to the \$10,000 a year rental paid to the Brooks-Scanlon Company by the lessee, the lessor, Brooks-Scanlon Company, required the lessee, Kentwood & Eastern Railway Company, to "keep and maintain said railroad in reasonable repair and condition during the continuance of this lease," and "that it will operate it in connection with its main line, and other lines of railroad, and that it will use all reasonable efforts to foster and increase its business," and to pay all taxes accruing during the continuance of the lease.

The lessor also required the lessee to reconstruct any of the permanent structures destroyed by fire, flood, or natural decay, and, during the first ten years of the lease, "such reconstruction shall be paid for in the proportion of sixty per cent by party of the second part (Kentwood & Eastern Railway Company) and forty per cent by the party of the first part (Brooks-Scanlon Company), and during the last ten years of this lease such reconstruction shall be paid for in the proportion of sixty per cent by the party of the first part (Brooks-Scanlon Company) and forty per cent by the party of the second part (Kentwood & Eastern Railway Company). (Words in parenthesis ours).

The earnings of the Brooks-Scanlon Company on the investment in the railroad which it leased was "between 6% and 7%." (Tr. 225).

Exemption from taxation was claimed on fourteen miles of the Kentwood & Eastern Railroad, the part lying between Warnerton and Hackley, Louisiana, by the Kentwood & Eastern Railway Company, and allowed by the State Board of Appraisers, (Tr. 196, 197, 198, 199). This exemption expired in the year 1912. (Tr. 196).

On January 29, 1918, the Kentwood & Eastern Railway Company wrote the Commission advising that the "Brooks-Scanlon Company, the owner and lessor of the narrow gauge railroad track running from Kentwood to Hackley, has served written notice on us, in accordance with the terms of the lease to us, of the cancellation of our lease, to take effect six months from the 22nd day of October, 1917," and further advised the Commission that "In consequence of the cancellation of our lease we will be unable to operate trains on this narrow gauge track on and after the 22nd day of April, 1918," etc. (Tr. 234). The Commission had previously notified the Kentwood & Eastern Railway Company that it could discontinue its operations on the Kentwood &

Eastern Railroad, (Tr. 234); but no such permission was ever sought by or granted to the owner, Brooks-Scanlon Company.

## 5

**Points Decided by the Supreme Court of Louisiana.**

The Supreme Court of Louisiana in its decision of March 3, 1919, (Tr. 51-57), held that:

1. It is settled that the Commission may prevent the removal or abandonment of a railroad which is in use and in which the public has an interest.

2. The Kentwood & Eastern Railway was among the property transferred by the Brooks-Scanlon Lumber Company to the Brooks-Scanlon Company. It, the railroad, was a going concern, a carrier, engaged in transporting passengers and freight, express and the mails.

3. All of its privileges were exercised under the authority and protection of the Interstate Commerce Commission and the Railroad Commission of Louisiana, and all of these privileges had been continued to be exercised until about the time of filing this suit.

4. The Brooks-Scanlon Lumber Company acquired the railroad from the Banner Lumber Company in 1905, and operated it for a short time as a common carrier in 1905.

5. The incorporators of the Brooks-Scanlon Lumber Company and the Brooks-Scanlon Company, after acquiring the Kentwood & Eastern Railroad, caused the Kentwood & Eastern Railway Company to be organized, and it became the lessee of the road-bed, and the purchaser of the rolling stock of the road. The Brooks-Scanlon Company assumed the position of lessor, and the Kentwood & Eastern Railway Company became the lessee of the railroad on July 1, 1906. Since that time the road has been operated as a common carrier in the name of the Kentwood & Eastern Railway Company.

6. The Kentwood & Eastern Railway Company and the Brooks-Scanlon Company were to all intents and purposes the same corporation.

7. The Brooks-Scanlon Company is admittedly a corporation engaged in business in the State of Louisiana; and as such is amenable to the laws of the state.

8. It is the owner of a railroad bed, including cross ties and rails, which it acquired with its saw mill and lumber business, which road had been operated by two of its predecessors in the same business.

9. It entered into a lease with the Kentwood & Eastern Railway Company and assumed the role of lessor.

10. The lessee was a subordinate or affiliated cor-

poration, or an interlocking corporation, with the plaintiff, the incorporators of the one being the stockholders of the other.

11. The contract of lease did not operate a discharge of plaintiff from continuing the services of a common carrier on its railroad.

12. The laws of Louisiana permit the combination of railroading and the manufacture and transportation of lumber of all kinds in one charter in the State of Louisiana.

13. A railroad is a very necessary appliance in carrying on the business of a large timber plant; which was one of the purposes of the plaintiff corporation.

14. The charter of the Brooks-Scanlon Company gave it the right to combine the two businesses of railroad and manufacture and transportation of lumber.

15. It is evident that the Brooks-Scanlon Company so construed its charter when it bought the railroad and the sawmill business from its predecessor.

16. The Brooks-Scanlon Company owns the stock together with the franchise and all belongings of the railway company.

17. The test of whether plaintiff's property would be taken without compensation by compelling it to perform an assumed public duty, is the net result from the whole enterprise.

18. The order of the Railroad Commission of Louisiana requires petitioner to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for plaintiff.

19. The Brooks-Scanlon Company has not petitioned the Railroad Commission to permit it to discontinue its business of railroad, and until it has done so, and the Commission has acted, the courts are without jurisdiction.

The order of the Railroad Commission also permits substantial advances in freight rates. (Order of the Commission). (Tr. 9).

### **Federal Question Raised.**

No attack is made in this case upon the validity of the authority under which the Railroad Commission of Louisiana has acted. The contention is that the order of the Commission exceeds its authority and violates the Federal Constitution, because:

1. It requires a railroad owned by a lumber com-

pany to be operated at a loss, when the railroad business is independently considered.

2. Therefore, takes its property without due process of law, in violation of the Federal Constitution.

3. The order is repugnant to the Federal Constitution in that it requires a corporation to engage in a business not permitted by its charter, in violation of the contract with the state which it claims to exist by virtue of the charter.

These contentions were all decided adversely to petitioner by the Supreme Court of Louisiana.

## II

### ARGUMENT ON THE FACTS.

#### 1

Petitioner alleges in its petition filed in the court of original jurisdiction that "in order to begin operation of such a railroad your petitioner would be compelled to incur an outlay for equipment and repair to track, rolling stock, material, etc., of over \$50,000." (Tr. 2). This allegation is repeated in the petition for writ of certiorari filed in this court. This allegation was specifically denied by the defendant, in its answer. (Tr. 11).

Here was an issue clearly raised in the pleadings. The burden of proof was on the plaintiff. Yet on the

trial in court not a syllable of evidence was introduced by the Brooks-Scanlon Company in support of this allegation. Unless the evidence supports such an allegation, it is groundless. The only witness for the Brooks-Scanlon Company before the Commission was J. S. Foley, its General Manager, who testified before the Railroad Commission (Tr. 216-229).

Although we may fairly assume that some equipment may have to be purchased by the Brooks-Scanlon Company, it would easily have been obtainable from the Kentwood & Eastern Railway Company at the time the notice was given by the Brooks-Scanlon Company of its intention to cancel the lease. The testimony before the commission is that the Brooks-Scanlon Company "owns some locomotives that it uses in its logging operations." (Tr. 219).

The petitioner having failed to offer any additional proof in court in support of its allegation that it would be compelled to incur an outlay for equipment and repair to track, etc., of over \$50,000, should not now be heard in a complaint that the Supreme Court of Louisiana has erred in its decision. In the brief filed by petitioner in support of its application for certiorari, it is again said:

"It will require from \$50,000 to \$60,000 to provide rolling stock and equipment, and will



require some \$10,000 additional to bring the roadbed from the condition in which it was at the time the proceedings were begun up to a safe condition for use."

Nothing in the record supports this statement. The only reference to such an expenditure is the allegation in the petition in the trial court, heretofore referred to, unsupported by proof. The Supreme Court of Louisiana rightly ignored the point. The plaintiff had failed to sustain the burden of proof.

In this connection we call the court's attention to the testimony of Mr. George A. Keyes, who testified before the Railroad Commission that the Brooks-Scanlon Company had sold its equipment to the Kentwood & Eastern Railway Company, lessee of the narrow gauge railroad, for approximately \$35,000. (Tr. 180). So that, admitting for argument only, that the new equipment would cost \$50,000.00, the petitioner has received from the proceeds of the sale of its equipment in 1906, \$35,000 which it could readily reinvest in such equipment as is necessary to operate its railroad.

In the equipment sold to the Kentwood & Eastern Railway Company was included a number of log cars which would not be needed now.

The expenditures in the railroad track are as fan-

ciful as the expenditures in the equipment. No evidence was introduced in court, on this point, and the testimony before the Railroad Commission shows that the roadbed was "fully as good, if not a little better," when turned back to the Brooks-Scanlon Company, as when the Kentwood & Eastern Railway Company took the railroad over. (Tr. 182).

The Brooks-Scanlon Company could have purchased the same equipment from the Kentwood & Eastern Railway Company in 1919, that it sold in 1906, for less than \$35,000, as Mr. Keyes testified before the Railroad Commission that the Kentwood & Eastern Railway Company had made a contract to sell its equipment for approximately \$30,000. (Tr. 189, 201).

On account of the close alliance between the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company, there can be no doubt that the equipment could have been repurchased by the Brooks-Scanlon Company for at least the same amount as it was offered for sale to other parties.

These uncontradicted facts in the record, destroy petitioner's contention that the investment necessary in order to acquire essential equipment to operate the railroad would amount to confiscation.

Compliance with the order of the Commission in accordance with the decision of the Supreme Court of Louisiana, would only compel the petitioner to put back into the property the capital it had taken out of the property at the time the railroad was leased to the Kentwood & Eastern Railway Company, and as the roadbed and track were "fully as good, if not a little better condition" when the railroad was turned back as when it was leased, the capital expenditures necessary to prepare for operation would only have been nominal. There was no more reason for interruption in the service than there was when the Kentwood & Eastern Railroad was originally acquired by the Brooks-Scanlon Company.

There is no showing on the record that the operation of the Kentwood & Eastern Railroad by the Brooks-Scanlon Company, its owner, will be conducted at a loss, the entire business considered.

The Supreme Court of Louisiana, in its opinion under review, says:

"The only question left for determination is whether plaintiff can be compelled by the Railroad Commission to operate its railroad and thus discharge its assumed obligations to the public when it is alleged that the operation thereof would entail a loss upon it. The tes-

timony found in the record shows a necessity for the continuance of the operation of the railroad for transportation of passengers, freight, mail and express matter. Plaintiff offered testimony only as to the earnings of the railroad, of one branch or department of its business. This showed a loss. But, the test of whether plaintiff's property would be taken without compensation by compelling it to perform an assumed public duty is the net results from the whole enterprise. The evidence should show net results from the entire business of the corporation; and not the results of only a branch or department of that business. One branch of a business might always be operated at a loss, while the entire business would be profitable. Again, the order of the Commission orders plaintiff to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for plaintiff." (Tr. 56).

The evidence referred to by the Supreme Court of Louisiana in its decision was, of course, the evidence heard by the Railroad Commission, since the plaintiff, petitioner herein, did not offer any additional evidence before the trial court.

The figures upon which the petitioner now rests its contention that the operation of its railroad, under its assumed obligations as a common carrier, would be at a loss, are found in the testimony of the General Manager of the Kentwood & Eastern Railway Com-

pany, and the General Manager of the Brooks-Scanlon Company.

The Supreme Court of Louisiana, in its decision, points out two very salient facts on this proposition, viz:

1. That plaintiff offered testimony only as to the earnings of one branch or department of its business.
2. The Commission orders plaintiff to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for plaintiff.

When the case was heard by the Railroad Commission in June, 1919, the Kentwood & Eastern Railway Company was a party. The testimony shows that for the year ending December 31st, (erroneously printed in the record "13"), the net earnings of the Kentwood & Eastern Railway Company were \$47,432.13 (Tr. 202). While no dividends were paid for that year, the net earnings amounted to "a trifle over 10%" (Tr. 202) on the capital invested in the property. Since the Kentwood & Eastern Railway Company owned the equipment used in operating the Kentwood & Eastern narrow gauge railroad in the year 1913, and the expenses and earnings of the narrow gauge railroad were included, the net earn-

ings for the year 1917 were from "the entire operations," (Tr. 202), it will be seen that the Brooks-Seanlon Company was able to operate the entire property, including the Kentwood & Eastern Railway Company, at a net profit amounting to 10% on the invested capital.

The language of the Supreme Court of Louisiana, "plaintiffs offered testimony only as to the earnings of the railroad, of one branch or department of its business. This showed a loss. But, the test of whether plaintiff's property would be taken without compensation by compelling it to perform an assumed public duty, is the net result from the whole enterprise," states a principle which has often been recognized by this court.

This doctrine is sound. The main question presented here is not the cost of performing a particular service, nor the rate of compensation fixed for such service, but the right of a common carrier railroad to absolve itself absolutely from its public duty. When it is shown that when operated under lease by another railroad, the net earnings on the invested capital was a trifle over 10% (Tr. 202), there is no foundation for the assertion that continued operation by the owning company on reduced service, and at increased rates, will result in confiscation.

The Brooks-Scanlon Company, petitioner, was not suffering any loss by its arrangement with the Kentwood & Eastern Railway Company to operate the railroad. The equipment had been sold to the Kentwood & Eastern Railway Company, and the value of the roadbed, track, station houses, terminals, depots, and other appurtenances, in which the Brooks-Scanlon Company retained the ownership when the lease was made, was \$100,000, and it was upon this amount the Brooks-Scanlon Company earned a trifle over 10% (Tr. 202), according to the witness for the Kentwood & Eastern Railway Company. If by its own act, it has placed itself in a condition where it must now take less, it has done so with its eyes open, and not by any compulsion, except that it must continue to perform its assumed duty to the public.

A great part of the expense in operating the narrow gauge railroad was operating log trains, which hauled logs for the petitioner.

The heaviest tonnage on the railroad has always been logs (Tr. 207). The log trains will be discontinued and as a result the operating expenses will be reduced (Tr. 207).

The figures which were produced to show the results of the operation of the Kentwood & Eastern

Railroad for the year 1917, include the expense of operating log trains. They do not show the expense that will be eliminated by the discontinuance of these logging trains, should they become no longer necessary.

## 2

**The order of the Railroad Commission does not fix the measure of the service.**

The order specifies:

“That the Brooks-Scanlon Company, either directly or through arrangements made with the Kentwood & Eastern Railway Company, shall operate its narrow guage line of railroad between Kentwood, Louisiana, and Hackley, Louisiana, by running mixed passenger and freight trains thereon upon such convenient schedules and upon such days as may be approved by the Commission, the said Brooks-Scanlon Company, or its lessee, to prepare and submit to the Commission for its approval, without delay, a time table showing the schedules upon which it is proposed to operate such trains.”

The entire matter of arranging to operate the railroad in the most economical manner possible is left to the Brooks-Scanlon Company. It has the option of operating the road itself, or of leasing it to the Kentwood & Eastern Railway Company as it had done when it originally acquired the property. The



Brooks-Scanlon Company owns the stock of the Kentwood & Eastern Railway Company, and controls it, "the incorporators of one being the stockholders of the other." (Tr. 56). One of the purposes for which the Kentwood & Eastern Railway Company, former lessee of the Kentwood & Eastern Railroad, was incorporated, was "to construct, purchase, maintain, own and operate during the existence of its charter, and to buy, sell, or lease, in whole or in part, a continuous line of railroad, with all its accessories and appurtenances, from the town of Kentwood, in the Parish of Tangipahoa, State of Louisiana, through or near the Parish of Washington, and St. Tammany, to the Eastern and Northern boundary of the State of Louisiana, along such line of definite location and to such point or points as the engineers of the company, with the approval of the board of directors, may specifically determine, and thence into and through the State of Mississippi, and other states and to purchase, construct, maintain, and operate such branch railroads from the main line in any and all directions and from such point or points as may be determined by the engineers of said company, with the approval of the board of directors."

There was no dispute between the two companies

to bring about a cancellation of the lease. It was cancelled as a mere matter of expediency, in total disregard of the rights of the public.

The Kentwood & Eastern Railway Company was solvent, and earning enough to pay its fixed charges, including the rental due the Brooks-Scanlon Company, so that there was no cause for alarm that it could not promptly meet its obligations.

The Supreme Court of Louisiana did not err in holding that: "The Brooks-Scanlon Company, or its incorporators, shortly after it had acquired the business and railroad of the Brooks-Scanlon Lumber Company caused the Kentwood & Eastern Railroad Company to be organized."

The record shows very clearly that the "incorporators" of the Brooks-Scanlon Lumber Company and the Brooks-Scanlon Company were about the same persons. The "incorporators" of the Brooks-Scanlon Company caused the Kentwood & Eastern Railway Company to be organized. This is shown in the testimony which was taken before the Interstate Commerce Commission December 13-15, 1910, of record in this case. (Tr. 66). From this testimony we quote the following:

"Examiner Burchmore: Before we pursue this line of inquiry further, I understand that

the Kentwood & Eastern Railway Company is controlled through its ownership of stock by the stockholders of the Brooks-Scanlon Company?

Mr. Keyes: Yes, sir.

Examiner Burchmore: Are the stockholders of the two companies substantially identical?

Mr. Keyes: Practically so. There are a few stockholders of the lumber company who are not in the railroad company, but all the stockholders in the railroad company are stockholders in the lumber company."

And again from the same testimony, the following:

"Examiner Burchmore: How was the railroad corporation originally financed?

Mr. Keyes: It has been financed by the Brooks-Scanlon Company. It has a capital stock of \$100,000.

Examiner Burchmore: How much of that is issued?

Mr. Keyes: All of it.

Examiner Burchmore: And paid in?

Mr. Keyes: Yes, sir.

Examiner Burchmore: Was that paid in by the stockholders of the Brooks-Scanlon as such?

Mr. Keyes: Not as stockholders of the Brooks-Scanlon Company, no, sir.

Examiner Burchmore: The same interests control it?

Mr. Keyes: Yes, sir.

Examiner Burchmore: Who are the Brooks-Scanlon Company—any other syndicate?

Mr. Keyes: No, sir." (Tr. 68).

There can be no dispute of the fact that the incorporators of the Brooks-Scanlon Lumber Com-

pany before the Brooks-Scanlon Company was organized did cause the Kentwood & Eastern Railway Company to be organized. There is no doubt that the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company were owned and controlled by the same interests, and that the Brooks-Scanlon Company clearly established this interest in 1910, when its representatives testified before the Interstate Commerce Commission.

In its supplemental report in The Tap Line Case (23 I. C. C. 549, 639), the Interstate Commerce Commission said:

"The Kentwood & Eastern Railway Company is owned by the stockholders of the Brooks-Scanlon Lumber Company. The two companies have the same officers, whose salaries, aggregating \$20,000 per year, are prorated between the companies in the proportion of their capital stock. The tap line was incorporated in 1905; its capital stock amounts to \$100,000; and it is indebted to the lumber company in the sum of \$220,000, on which it pays interest."

### III

#### ARGUMENT ON THE LAW.

##### 1

The Railroad Commission of Louisiana had power and authority to make and enforce the order in controversy.

The Constitution of 1898 of the State of Louisiana provided for a Railroad Commission, to which was entrusted extensive regulatory powers over railroads operated within the State of Louisiana. (Articles 284 to 289, inc., Const. of Louisiana, 1898 and 1913.)

Article 284 of the Constitution of Louisiana provides that:

“Art. 284. The power and authority is hereby vested in the commission, and it is hereby made its duty, to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, steamboat and other water craft, sleeping car, express, telephone and telegraph lines of this state, and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance over the same line, unless authorized by the commission to do so in special cases; to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations, and to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great

trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction.

"The commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and to hear and determine complaints that may be made against the classification or rates it may establish, and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts, required or authorized by these provisions. The Commissioners shall have power to summon and compel the attendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under commission, and to punish for contempt as fully as is provided by law for the district courts."

In 1907, an amendment was adopted to the Constitution of 1898, Article 286, in which the powers and duties of the Railroad Commission of Louisiana were enlarged.

This amendment became a part of the Constitution of Louisiana as adopted in 1913.

The last sentence of the amended article is as follows:

"The power and authority of the commission shall affect and include not only the transportation of passengers, freight, express

matter, and telegraph and telephone messages between points within this State, and the use of such instruments within this State, but shall also affect and include all matters and things connected with and concerning the service to be given by railroad, express, telephone, telegraph, steamboat and other water craft, and sleeping car companies, and corporations in the State, and their operations within the State."

Const. of La., 1913.

That the State has the right to govern and regulate railroads and delegate such power to a Railroad Commission, is thoroughly settled in the jurisprudence.

In the broad powers delegated by the Constitution of Louisiana to its Railroad Commission, is the power "to govern and regulate railroad \* \* \* \* \* freight and passenger tariffs and service."

The Supreme Court of Louisiana in the case of Railroad Commission of Louisiana vs. Kansas City Southern Ry. Co. 111 La. 133, upheld the power of the Commission to prevent the abandonment of any part of a railroad. Mr. Justice Breaux, delivering the opinion of the Court, said:

"The power to regulate authorizes appropriate orders to maintain the property in the condition of use in which it should be kept; that is, in a safe and useful condition. This

intention, we take it, in authorizing the Commission to 'regulate' and 'govern'—words of the organic law—was to invest the Commission with sufficient authority to prevent the railroad from taking down and doing away with any part of its road."

Before an order requiring a common carrier to perform a duty owed the public can be declared unconstitutional and void by the court, it must appear beyond any reasonable doubt that the act is invalid.

## 2

**A federal question is not raised in time to give this court jurisdiction when presented for the first time in a petition for rehearing.**

After judgment had been rendered by the Supreme Court of Louisiana on March 3, 1919, the Brooks-Scanlon Company applied for a rehearing, and in paragraphs 13, 14 and 21 of its petition for rehearing (Tr. 59, 69), which was denied, raised for the first time the question of the validity of the order of the Railroad Commission in controversy on the ground that it impaired the obligation of a contract existing by virtue of its charter with the State of Louisiana, in violation of Article 1, Section 10, paragraph 1 of the Federal Constitution.

In the petition for writ of certiorari presented to



this Honorable Court by the petitioner, it was again urged as ground for granting the writ that the enforcement of the order of the Railroad Commission of Louisiana will divest petitioner of vested rights and impair the obligation of its contract in derogation of the Constitution of the United States, particularly Amendments 5 and 14 and article 1, section 10, paragraph 1.

Since the impairment of contract clause of the Federal Constitution was invoked for the first time in the petition for rehearing in the Supreme Court of Louisiana, the question is not raised so as to give this court jurisdiction.

Johnson v. N. Y. L. Ins. Co., 187 U. S. 586, 47 L. ed. 273.

In the case of Forbes v. State Counsel of Virginia, 216 U. S. 396, 399, 54 L. ed. 534, 535, Mr. Justice Day, delivering the opinion of the court, says:

“It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.”

The exception to the rule is when the court entertains and passes upon the Federal question so raised,

which the Supreme Court of Louisiana did not do in this case.

The only Federal question properly presented to the lower court, and passed upon by it, is the question whether the order of the Railroad Commission of Louisiana, requiring the Brooks-Scanlon Company to operate train service on the Kentwood & Eastern narrow gauge railroad, which it owns, amounts to taking its property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

## 3

**Among the Constitutional questions raised is that the contested order is repugnant to Article V of the Amendments to the Constitution of the United States.**

The validity of the articles of the Constitution of the State of Louisiana creating and defining the powers and duties of the Railroad Commission of Louisiana, on the ground of repugnancy to the Constitution of the United States, has not been called into the question.

The exercise of authority by the Railroad Commission of Louisiana in adopting the order in controversy is attacked in the original petition on the ground that

it is repugnant to Articles V and XIV of the amendments to the Federal Constitution. Article V, the due process of law clause, was not intended to limit the powers of state governments in respect to its own people, but to operate on the National Government alone. Ex Parte Spies, 123 U. S. 131, 31 L. ed. 80.

Chief Justice White, in delivering the opinion in Ex Parte Spies, referring to the first ten amendments to the federal Constitution, says:

"That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

## 4

**The Fourteenth Amendment is not violated by the order in controversy.**

The only remaining federal question passed upon by the lower court is whether the State of Louisiana has deprived the petitioner of its property without due process of law in violation of the Fourteenth Amendment.

It is also contended that the order of the Railroad Commission of Louisiana in controversy exceeds the

limitations placed upon state power by the Fourteenth Amendment in that the property of the petitioner is taken without due process of law because, considered alone and without reference to the new and reduced service, and the advanced rates allowed by the order, the narrow gauge railroad separately considered, showed a loss in its operations for the year 1917.

It is, therefore, necessary to examine the opinion of the lower court on this point, since it alone affords the sole basis for the claim that a federal question sufficient to give this court jurisdiction has been determined wrongfully.

Petitioner contends that the right of which it has been deprived by the order of the Railroad Commission of Louisiana is the right to abandon its common carrier railroad, because for a certain period and under certain conditions, the railroad showed a loss.

This is the federal question presented by petitioner, and if this federal question has been decided properly by the Supreme Court of the State of Louisiana, then this Court will dismiss the writ and affirm the judgment under review.

The finding by the Supreme Court of the State of Louisiana that the Brooks-Scanlon Company, peti-

tioner, has not shown a loss in the operation of its entire business, including its railroad, and that the order of the Railroad Commission of Louisiana in controversy permits a rearrangement of schedules which will greatly lessen the cost of operation, and the further fact that the order of the Railroad Commission of Louisiana permits advances in freight rates over those previously in effect, sufficiently answer the contention which is raised by petitioner.

The order of the Railroad Commission of Louisiana sets forth fully the conditions surrounding the operations of the Kentwood & Eastern Railroad. The Brooks-Scanlon Company was receiving a rental of \$10,000 a year payable in monthly installments from the Kentwood & Eastern Railway Company at the time its lease was cancelled, which was to run for a period of 20 years from 1906.

The Brooks-Scanlon Company cancelled the lease, thus depriving itself of the fixed money rental of \$10,000 a year which it was receiving up to April 21, 1918. This rental yielded a return of over 10% on the capital invested in the railroad.

The Brooks-Scanlon Company owned the necessary equipment to operate the railroad at the time it confirmed the lease with the Kentwood & Eastern

Railway Company, made by its predecessor, the Brooks-Scanlon Lumber Company, and sold this equipment to the Kentwood & Eastern Railway Company. If the money received from the sale of the equipment by the Brooks-Scanlon Company is re-invested in equipment for the operation of the railroad the situation will be as it was when the Brooks-Scanlon Company leased its railroad and sold its equipment to the Kentwood & Eastern Railway Company.

The Brooks-Scanlon Company has put itself in the position where it is necessary to purchase new equipment. It has by its own act, and without authority from the Railroad Commission of Louisiana, the authority created by the State of Louisiana to govern and regulate the railroads in Louisiana, attempted to renounce its duty to the public and to disable itself from performing it.

It has long been settled that the corporation engaged in the operation of a common carrier railroad cannot dispose of its property and franchise without legislative authority. York & Maryland Line R. Co. vs. Winans, 17 How. 30, 15 U. S. (L. ed.) 27; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 U. S. (L. ed.) 950; Central Transp. Co. vs. Pullman's Palace Car

Co., 139 U. S. 24, 11 S. Ct. 478, 35 U. S. (L. ed.) 55; Earle v. Seattle etc. R. Co., 56 Fed. 909; Indianapolis v. Consumers' Gas Trust Co., 144 Fed. 640, 75 C. C. A. 442; Georgia R. etc. Co. v. Haas, 127 Ga. 187, 9 Ann. Cas. 677, 56 S. E. 313, 119 Ann. St. Rep. 327; Kelley v. Forney, 80 Kan. 145, 101 Pac. 1020; Brunswick Gas Light Co. v. United Gas etc. Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston etc. R. Co., 115 Mass. 347; Weld v. Gas etc. Com'rs., 197 Mass. 556, 84 N. E. 101; Black v. Delaware etc. Canal Co., 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130; Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767, 32 LRA (NS) 848; Coe v. Columbus etc. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Susquehanna Canal Co. v. Bonhan, 9 Watts. & S. (Pa.) 27, 42 An. Dec. 315; Naglee v. Alexandria etc. R. Co. 83 Va. 433, 3 S. E. 369; 5 Am. St. Rep. 308; Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901.

In the case of Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950, Mr. Justice Miller states the principle as follows:

“That principle is, that where a corporation, like a railroad company, has granted to it by

charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

The expenditure of money is necessary in the giving of public service by a common carrier, but as it was said by the Supreme Court in the recent case of Chicago & Northwestern Railroad Co. v. Ochs, decided April 14, 1919. U. S. Adv. Ops. 1919, p. 407:

"As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the public. Northern Pac. R. Co. v. North Dakota, 236 U. S. 585, 595, 59 L. ed. 735, 741, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the



transportation of persons and property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore, an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense."

In the Ochs case an order of the Railroad and Warehouse Commission of Minnesota requiring a railroad company to alter and extend a side track leading from its main line to an adjacent brick and tile manufacturing plant was in question.

The following cases cited in the opinion affirm the doctrine announced in the Ochs case:

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 302, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 278, 279, 54 L. ed. 472, 479, 480, 30 Sup. Ct. Rep. 330; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 529; Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 631, 59 L. ed. 750, 756, P. U. R. 1915C, 263, 35 Sup. Ct. Rep. 422; Chesapeake & O. R. Co. v. Public Service Commis-

sion, 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234.

The case of Morgan's Louisiana & Texas Railroad & Steamship Company vs. Railroad Commission, 109 La. 247, is the leading case in the jurisprudence of the State of Louisiana on the subject of the power of the Railroad Commission of Louisiana to require service to be given to the public by a common carrier.

The Commission required the carrier in that case to build a new depot at a station called Berwick, Louisiana. The order was resisted on the ground that an order of the Commission which requires a railroad company to render service to a certain locality or class of its patrons without adequate compensation amounts to a deprivation, pro tanto, of property without due process of law. The contention was that the proceeds from the depot at Berwick would not meet the cost of operating the depot. It was not claimed that the railroad company was not a paying corporation. Chief Justice Nicholls, rendering the opinion, said:

"We do not think the point is made that, after the business of a railroad corporation has made it fairly remunerative, the commission is without general authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the

promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly into view, and it is not for the railroad, but for the commission, to determine how, in what way, and in what place this money is to be expended so as best to subserve their interest. That is a matter submitted to the judgment of the commission, not that of the railroad or of this court, unless the selection trenches upon the legal rights of the railroad corporation. The mere reference of disputed issues between the parties to this court for adjudication was not intended to constitute it an 'administrative' board, revisory in character over the orders and conclusions of the commission. Our action is judicial, not administrative. It was not intended that we should substitute our judgment for that of the commission every time there is a dispute touching the particular place on the line of railroad where it would be best for the public interest that a station or a depot should be placed."

## 5

**A railroad operated in Louisiana as a common carrier cannot be abandoned without the consent of the State.**

This is the fundamental proposition in this case.

The Constitution of Louisiana authorizes the Railroad Commission of Louisiana "to govern and regulate railroad, \* \* \* freight and passenger tariffs and service." Art. 284, Const. of La., supra.

Article 272 of the Constitution of the State of Louisiana of 1898 and 1913, provides that:

“Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers.”

With full knowledge of the law, the Kentwood & Eastern Railroad was constructed and dedicated to public use, and has been operated under the state laws for over 16 years.

The Supreme Court of the State of Louisiana says in the opinion under review:

“It is settled that the Commission may prevent the removal or abandonment of a railroad which is in use and in which the public has an interest.” Sup. Ct. of La., this case. (Tr. 51, 52.)

If this question is correctly settled by the Supreme Court of the State of Louisiana, then the case should be dismissed and the judgment of the Supreme Court of Louisiana affirmed.

The recognition of the state's power to prevent the removal or abandonment of a railroad in which the public has an interest is firmly established.

In the case of York & Maryland Line R. R. Co. vs. Winans, 17 How. 31, 15 L. ed. 27, supra, Justice

Campbell, who delivered the opinion of the Court, said, after stating the case:

"The conclusion implies that the duties imposed upon plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its rights to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed and corporate responsibility for their insufficiency provided as a remuneration to the community and their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature. *Beman vs. Rufford*, 1 Simon N. S. 550; *Winch vs. B. & L. Ry. Co.*, 13 L. & E. 506."

In Lake Erie & Western R. R. Co. vs. State Public Utilities Commission, ex rel. — U. S. — 63 L. ed. —, 39 Sup. Ct. Rep. 345, Pub. Util. Rep. 1919 D, 459, it was held that an order of a state Public Utilities Commission, made after notice and hearing, and upheld by the highest court of the state, requiring a railroad company to restore a side track which, before its removal, had served a grain elevator and

coal yard, does not deny due process of law, either as taking its property for private use or for public use without compensation, where under the laws of the state, such a side track was open to use by the public, and subject to public control like other parts of the company's railroad. In the opinion, Justice Van Devanter said:

"What the cost of restoration will be the record does not disclose, but the Commission, with a knowledge of such matters, has found that it is justified by the business reasonably to be expected; and the Supreme Court of the State, besides sustaining that and other findings of the Commission, aptly points out that but for the hasty and improper removal of the track the company 'would not be at the expense of replacing it.' When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service."

In Eel River R. R. Co. vs. State, 155 Ind. 456, 57 N. E. 396, it is held that the surrender of the property and franchises of a railroad, under lease in perpetuity, is ground for forfeiture of the franchise.

In St. Louis vs. St. Louis Gas Light Co., 5 Mo. App. 530, it is held that a corporation intrusted with a public franchise cannot part with it under any guise.

In Black vs. Delaware, etc., Canal Co., 22 N. J. Eq. 399, the rule is stated that a corporation cannot lease or alienate any franchise or property necessary to perform its duties to the state without legislative authority.

In James vs. Western, etc., R. R. Co., 121 N. C. 528, 28 S. E. 538, it is held that the sale of a railroad under second mortgage does not extinguish the corporation's existence, nor relieve it from liability to the public for the manner in which it is operated.

In Russell vs. Texas, etc., R. R. Co., 68 Texas, 652, S. W. 690, it is held that a railroad has no power to transfer its franchise without legislative permission.

In New York, etc. R. Co. vs. Bridgeport Traction Co., 65 Conn. 410, 423, 32 Atl. 953, 29 L. R. A. 367, cited approvingly in Gates vs. Boston, *post*, the court said:

"But the plaintiff holds its right of way charged with the performance of a public trust for its continuous use for public accommodation."

The state aided the railroad by exempting fourteen miles from taxation, which exemption was claimed and allowed for the first time in the year 1906, and it was only with the view of encouraging the building

of permanent railroads that such an exemption was allowed. The state could not have aided a purely private enterprise by relinquishing a portion of its revenues and it was never contemplated by the framers of the Constitution of the State of Louisiana of 1898, that the public should lose both the contributions and the railroad. In the case of Flint & Pere Marquette R. Co. vs. Rich, 91 Mich. 293, 51 N. W. 1001, this principle was clearly stated:

“It is certainly just and equitable that these contributors be not now deprived of the benefits of the road, and of the money which they paid to secure it.”

In the case of State ex rel Naylor vs. Dodge City M. & T. R. Co., 53 Kan. 377, 319, 42 Am. St. Rep. 295, 36 Pac. 747, the court discusses at length the obligation resting upon a corporation to operate a railroad which it owns, and goes so far as to hold that the unprofitableness of the enterprise is not controlling. The court said:

“The right to exercise the very high attributes of sovereignty, the power of eminent domain, and of taxation to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the



burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure, and other permanent property of the corporation are devoted to the public use. From this use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise as an investment be profitable or unprofitable, the property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction, railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railroads when they cease to be a public utility. It may be, also, that in an action prosecuted by the attorney general on behalf of the state to forfeit the charter and wind up the affairs of a railroad corporation, for any proper cause, the court might make all necessary orders for the disposition of the property of the company; but in this case the state appeared, by the county attorney of the county in which the railroad was located, protesting against the removal of the superstructure of the road. The court erred in refusing the injunction asked."

In support of these doctrines the court cites numerous authorities.

The Supreme Court of the State of Louisiana has

held that railroads operating within the State of Louisiana cannot be done away with or abandoned without consent of the Railroad Commission. R. R. Com. of La. vs. K. C. S. Ry. Co., 111 La. 133; State ex rel Tate vs. Brooks-Scanlon Company, 143 La. 539.

In Railroad Commission of Louisiana vs. K. C. S. Railway Company, *supra*, the Court says:

"The word 'regulate' has a broad meaning. We think it includes the power to see to the maintenance of the main track and all its switches and spurs as they were at the time of taking charge, and the power to prevent any change when reasonably, in public interest, no change should be made." \* \* \*

"When a change is to be made along the line—a switch or spur to be removed—the commission should be consulted, and its consent obtained.

"The power to regulate carries with it full power over the thing subject to regulation. Here the Constitution has placed the railroad and its appurtenances under the authority of the Commission.

"This, we understand, was the view taken by the courts in passing upon words in the interstate commerce act of similar import to those in our Constitution regarding railroads and their management, placed under a commission in accordance with the requirement of the interstate commerce act. The broadest meaning is given to the words 'govern' and 'regulate,' Am. & Eng. Enc. of Law, verbo,

'Interstate Commerce.' It follows the thing to be regulated includes main line and side track already laid.

"The switches and spurs in use are part of the railroad system. If they can be removed without the consent of the commission why should not the railroad company have equal right to change the direction of the main track entirely, without consulting and obtaining the consent of the Commission? We cannot see why one should be considered, under the Commission, to 'regulate' and the other not. The spur forms part of the main line subject to regulation.

"The power to regulate authorizes appropriate order to maintain the property in the condition of use in which it should be kept; that is, in a safe and useful condition.

"The intention, we take it, in authorizing the Commission to 'regulate' and 'govern'—words of the organic law—was to invest the Commission with sufficient authority to prevent the railroad from taking down and doing away with any part of its road."

In the recent case of State ex rel Tate et al. vs. Brooks-Scanlon Co., 143 La. 539, the Supreme Court again states, but in even stronger language, the principle announced in the Kansas City Southern case, supra. In defining the powers and duties of the Commission to prevent the abandonment of a railroad, the Court says:

"It is contended that the Railroad Commission is without power to prohibit common car-

riers from dissolving or totally abandoning their properties; that the Commission may in a case before it determine a reasonable rule; and that rule or order must, if contested, be reviewed by the courts, and enforced, if upheld; that it may control the railroads while they are in operation, but that it has no authority to prevent them from going out of business; that the courts must determine the question whether these defendants shall operate a railroad owned by them, before the Commission can exercise the authority to regulate and control the service.

“But, defendants are operating a railroad, and the Commission may exercise its authority to regulate and control the service thereof. To it is given the power and authority, not only affecting and including the transportation of passengers, freight, etc., but of ‘all matters and things connected with and concerning the service to be given by railroads, steamboats, etc., and their operations within the State.’ ”

The “defendants” referred to in the above decision were the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company, lessor and lessee of the Kentwood & Eastern narrow gauge railroad, the railroad in controversy in this proceeding.

These decisions by the Supreme Court of the State of Louisiana defining the power of the Railroad Commission of Louisiana to prevent the discontinuance or abandoning of a common carrier railroad in the

State of Louisiana without its consent, have never before been questioned.

There is complete harmony between the federal and state jurisprudence on this subject.

In People vs. Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657, it is held that a railway company is bound to construct its road to and from the several points named in its charter, to run trains over its line in such manner as to afford reasonable facilities for the prompt and efficient transaction of such legitimate business as may be offered to it on any and every part of its road; and this obligation is equally binding on its successors. No part of the road can be abandoned without rendering its franchises liable to forfeiture.

"A purchaser of a railroad under foreclosure is also bound to perform the duties to the public which are coupled with the enjoyment of the corporate privileges and which the original company owed to the public, such as the duty of properly constructing, repairing, equipping, and operating the road." 33 Cyc. 591. New York, etc., R. Co. vs. State, 50 N. J. L. 303; 13 Atl. 1 (affirmed in 53 N. J. L. 244; 23 Atl. 168).

In the case of International Great Northern Railroad Company vs. Anderson County, 246 U. S. 424, 62 L. ed. 807, the Supreme Court reversed on writ of error a decree of the Sixth Supreme Court of the Civil Appeals of the State of Texas, affirming a decree of the District Court of Cherokee County, enjoining the removal of machine shops, round houses and general offices of a railway company.

In disposing of the case, Mr. Justice Holmes, who delivered the opinion of the court, said:

“Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the court of the United States, it would not take away the power of the state court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. *Ricaud vs. American Metal Co.* (March 11, 1918, 246 U. S. 304, ante. 733, 38 Sup. Ct. Rep. 312.)

“But the foreclosures did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary courts. Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general officers were to remain forever at Palestine—it hardly would be argued, and certainly would not be argued

here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the remote reason for it was a contract or a general notion of public policy. The state courts hold that when the law on any ground fixes the place of the offices and shops, the obligation is indelible by foreclosure. We see no reason why their decision should not prevail."

## 6

**A private corporation owning a common carrier railroad may be compelled to operate the railroad. The obligation to discharge that duty must be considered in connection with the business as a whole.**

An important question in this case is whether the Supreme Court of Louisiana has correctly decided that the State of Louisiana may, through authority delegated to the Railroad Commission of Louisiana, control and regulate the railroads operating within the state in such a manner as to prevent the discontinuance of service and the abandonment of the railroad without the consent of the Commission. The question presents the secondary proposition whether a corporation which owns and operates a railroad has received exemptions from taxation, and has profited by all the benefits derived from its operations as a common carrier, may, at a time when

its properties have passed into the hands of others, arbitrarily and in complete disregard of the state laws, close up its business as a railroad.

Both of these propositions are negatively answered by the decisions of the Supreme Court of the United States, in many cases, and with an unbroken line of decisions by state courts whenever the question has been presented.

It is thoroughly established that a state, either directly, or by a public service commission to which the power is delegated, can compel a railroad to furnish service reasonably adequate to the needs of the portion of the public residing in the territory adjacent to its line. In Missouri Pacific R. Co. vs. Kansas, 216 U. S. 262, 30 S. Ct. 330, 54 L. ed. 472, in sustaining an order requiring a passenger service on a certain railroad branch in lieu of a previous mixed train service, the court said:

“In its principal aspect, this contention is based on the insistence that the order and findings of the commission and the findings of the referee, when elucidated by the proper inferences of fact to be drawn from the evidence, show the service which the order commanded could not be rendered without a pecuniary loss, and this it is insisted, is the case, not only because of the proof that pecuniary loss would



be occasioned by performing the particular service ordered, considering alone the cost of that service and the return from its performance, but also because it is asserted the proof established that the earnings from all sources, not only of the branch road, but of all the roads operated by the Missouri Pacific in Kansas, produced no net revenue and left a deficit. It is at once evident that this contention challenges the correctness of the inferences of fact drawn by the court below. They therefore assume that we are not bound by the facts as found by the court below, but must give to the evidence an independent examination for the purpose of passing on the constitutional question presented for decision. But we do not think the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that, on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory, because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession

and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, *supra*. In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that the return from the operation of such train would not be remunerative."

In the leading case of *Munn vs. Illinois*, 94 U. S. 113, 24 L. ed. 77, the legal doctrine was established that when the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. This principle was re-examined and elaborately reviewed some years later, under a New York warehouse law, and was reaffirmed by a majority opinion, and a vigorous dissent by Justice Peckham. *People vs. Rudd*, 117 N. Y. 18, 15 Am. St. Rep. 472, 5 L. R. A.

566, 22 N. E. 676, affirmed in Budd vs. New York, 143 U. S. 547, 36 L. ed. 256. The doctrine enunciated in the Munn case has never been departed from, and later decisions have tenaciously adhered to it, until now it may be generally regarded as "too well settled to be longer the subject of controversy."

In Cotting vs. Godard, 183 U. S. 79, 46 L. ed. 92, it was held that individuals and corporations who have devoted their property to a use in which the public have an interest are subject to the state's power of regulation.

In Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission, 206 U. S. 1, 26, 27, 51, L. ed. 933, cited at length by the Chief Justice, in the Kansas case, *supra*, it is said:

"As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident some pecuniary loss from rendering such service may result." \* \* \* \*

"As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporation business as a whole, the character of the service required, and the public need for its performance."

In the final analysis, the order of the Railroad Commission as sustained by the Supreme Court of the State of Louisiana merely requires the performance of an obligation which is the result of the ownership of a common carrier railroad by the Brooks-Scanlon Company. The obligation to operate the railroad was fully recognized in the lease which was made between the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company, and as was said by the Supreme Court of Illinois in People ex rel. Cantrell vs. St. Louis A. & T. H. R. Co., 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292, and quoted approvingly by the Supreme Court of the United States in Missouri P. R. Co. vs. Kansas, *supra*:

"Independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers no less than as a carrier of freight."

The decisions which we cite leave no further question as to the validity of the order of the Rail-

road Commission of Louisiana in requiring the Brooks-Scanlon Company to operate the minimum service at advanced rates on the Kentwood & Eastern Railroad, and the correctness of the decision of the Supreme Court of Louisiana upholding the order.

The petitioner claims that its business is the manufacture and sale of lumber, and therefore it cannot be compelled to operate a railroad. Its main business may be the manufacture and sale of lumber but this circumstance does not relieve the petitioner from carrying out its assumed obligation as a common carrier.

Justice Hunt in the case of Randolph Co. vs. Post, 93 U. S. 507, S. C. Rep. 502, 23 L. ed. 957, said:

"No court has authority to say that an operating railroad is less a railroad, is less valuable to a country through which it passes, because it proposes to mine and transport coal, to manufacture and transport flour, to carry on iron foundries, digging and buying the raw materials, employing men to manufacture them into different kinds of iron articles of use or luxury, and transporting them as may be required, than if it confined itself to the business of a carrier. So far as the probable success or advantages of such undertakings are concerned, it is not for us to decide upon it."

In Westport Stone Co. vs. Thomas, 175 Ind. 324, 94 N. E. 408, 35 L. R. A. 646, the Supreme Court of Indiana said:

"It is not a question whether appellant is a private or public corporation, but whether the use is a public one. If it is to be so used, the right of condemnation can be bestowed upon any private corporation; but if not to be so used, it cannot be conferred upon either a private or public corporation."

The learned author of the notes upon this subject given in Lawyer's Reports Annotated, states the rule as follows:

"The general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, and cases which are apparently in conflict with this rule will be found to have turned on special circumstances which warranted the decision." L. R. A. 1915 A. 549.

In State vs. Atlantic, etc., R. Co., 41 Fla. 676, 12 Ann. Cas. 1047, 13 L. R. A. (N. S.) 320, it is held that mandamus lies at the suit of the state to compel a railroad to maintain its track and equipment for the exercise of its functions.

In Talcott v. Pine Grove Twp. 1 Flipp. 120, Fed. Cas. No. 13,735, the validity of municipal bonds in

aid of a railroad was attacked on the ground of participating in a private enterprise. There was some conflict in the cases at that time upon the proposition. This occasioned an extended discussion of the public character of a railroad. The relation of a railroad corporation to the state was defined by the court as follows:

"The road once constructed is instanter, and by mere force of the grant and law, embodied in the governmental agencies of the state and dedicated to public use. All and singular its cars, engines, rights of ways, and property of every description, real, personal, and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage, the corporation created by the sovereign power expressly for this sole purpose and no other, is in the most strict technical and unqualified sense but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents both in theory and practice. Every farthing of its tolls is first to be devoted to paying the public tax, and to the continuance of the road, its ample equipment and regular operation as the interests of the community, not those of shareholders, demand. No matter that a dividend is never paid, that the private investment is sunk and worthless, that the interest upon its bonds is not met, and that all its creditors go unpaid, every dollar of its earnings must nevertheless be applied to keep up its maxi-

mun efficiency, as required by the political power in the law which created it. The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus, and in Michigan by various statutory proceedings at the suit of the attorney general. This law officer of the state is especially charged by statute with the duty of enforcing them. That a railroad cannot be abandoned after it has become one of the thoroughfares of the country, and that the company will, by proceedings in behalf of the state, be forced to continue its road and perform all its duties to the public, is beyond question."

In Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 342, 5 Atl. 695, 699, 700, the court makes a summary of the obligations devolving upon a railway company, as follows:

"It is true that a charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad; the option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the state in taking property of others, and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road, has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their



personal and business relations, upon that state of affairs; by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects of the charter, and the capital stock, franchises, and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers, the corporation has no right, against the will of the state, to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders. The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property, in which whole communities, created and existing upon the faith of the continuous use of the chartered powers, are interested, and, indeed, the life of the citizen, as well as his property rights, are thus jeopardized. Upon principle it would seem plain that railroad property, once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise by a private person of the powers of a state, is superior to the property rights of corporations, stockholders, and bond holders. To this effect, also, is the weight of authority. In the following cases are illustrations of the general principle: *High, Mandamus*, 315-317;

State v. Hartford & N. H. R. Co. 29 Conn. 537; Railroad Com. v. Portland & O. C. R. Co. 63 Me. 278, 18 Am. Rep. 208; Atty. Gen. v. West Wisconsin R. Co. 36 Wis. 466; People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295; People ex rel Wheeler v. Long Island R. Co., 31 Hun. 127; State ex rel Atty. Gen. v. Southern Minnesota R. Co. 18 Minn. 40, Gil. 21 Re. New Brunswick & C. R. Co. 17 N. B. 667; Yord & N. Midland R. Co. v. Reg. 1 El. & Bl. 858, 7 Eng. R. & C. Cas. 459, 1 C. L. R. 119, 22 L. J. Q. B. N. S. 225, 17 Jur. 630, 1 Week. Rep. 358.

The American and English cases which seemingly doubt these propositions place their conclusions upon the construction of the particular chartered powers and obligations. \* \* \* \* The necessary conclusion is that the state has a right to enforce the continuous exercise of the corporate powers and franchises; and this is true no matter what private right may embrace the title of the property."

In State ex rel Railroad Commissioners vs. Bullock (Florida), 83 Sou. Rep. 866, the Supreme Court of Florida held that the operation of a common carrier railroad is a business so affected with a public interest that when once undertaken and begun it cannot be discontinued and the road so operated abandoned and authorized to be dismantled when such discontinuance and dismantling has not been consented to by the state. The court follows the unbroken line of decisions to the same effect, and, in discussing the

jurisdiction of a state circuit court in a suit in which the state is not a party, brought by a trustee against a common carrier railroad company to foreclose a trust deed upon the properties of such railroad company given to the trustee to secure the payment of the indebtedness of the railroad company, and in such suit order the railroad dismantled, its properties removed, and its operation as a common carrier discontinued, says:

“This question must be answered in the negative upon the theory that the operation of a common carrier railroad is a business so affected with a public interest that when once undertaken and begun it cannot be discontinued and the road so operated dismantled and abandoned by a proceeding in which the state and the public are not represented. By the acceptance of its charter from the state such a company is permitted to exercise certain rights not enjoyed by individuals. It is given certain of the attributes of sovereignty itself, such as the power of eminent domain. It likewise is charged with the performance of certain public duties, namely, the duties of a common carrier. While it is constructed by private capital and is primarily controlled by individual effort, it is a public instrumentality subject in its operation to regulation by public authority. Accordingly, therefore, the public has such an interest in the operation of such a road that, when once undertaken, it may not be discontinued by a proceeding in which the

state is not represented, when such discontinuance has not been consented to by the state. 22 R. C. L. p. 750; *State v. Dodge City M. & T. Ry. Co.* 53 Kan. 377; 36 Pac. 747, 42 Am. St. Rep. 295; *Gates v. Boston & N. Y. Air Line R. R. Co.*, 53 Conn. 333, 5 Atl. 695; *People v. Colorado Title & Trust Co. (Colo.)* 178 Pac. 6; *Brooks-Scanlon Co. v. Railroad Commissioners of Louisiana*, 144 La. 1086, 81 South. 727."

\* \* \* \* \*

"A common carrier railroad company is a corporate entity with franchise rights and obligations, and its property is devoted to a public service which is continuous under the laws of the state. The franchise rights of the corporation may be forfeited to the state; but the corporation cannot lawfully dismantle its roadbed of ties and rail and withdraw the property that has been devoted to the public service, without the acquiescence of the state in some manner prescribed by law. While a court of equity may enforce a mortgage lien on the property of a railroad corporation by a sale of the property, the court has no authority to order or permit the track and other property of the company to be withdrawn or removed from the public service to which it was devoted, except as may be prescribed by statute; and there is no statute in this state giving such authority to the courts or to other tribunals."

**Under the laws of the state of Louisiana the charter of the Brooks-Scanlon Company permits it to operate a railroad.**

Petitioner contends that its charter does not permit it to operate a railroad. Its contention is based upon its present interpretation of its charter and is directly contrary to the construction which it placed upon its charter when it purchased the Kentwood & Eastern narrow gauge railroad and leased it to an operating company, so that its operations might not be interrupted.

The Supreme Court of the State of Louisiana has directly held that the laws of the State of Louisiana permit the combination of railroad and the manufacture and transportation of lumber of all kinds in one charter, and that the charter of the Brooks-Scanlon Company gave it the right to combine the two businesses in that section, which states in part:

“The general nature of its business shall be to manufacture, buy, sell and deal in timber, logs, lumber, building materials and other personal property; to buy, sell, hypothecate, own and hold stock in other corporations; also to buy, own, lease, mortgage, sell, deal in and improve any real estate wherever situated, and to carry on any other lawful business

necessary or proper for the accomplishment of the purposes of the corporation." (Charter Brooks-Scanlon Co., Tr. 269.)

The Supreme Court of Louisiana has interpreted its own Constitution and laws and holds in its decision that the charter of the Brooks-Scanlon Company gave that company the right to own and operate a railroad. We believe this court will agree that there is no reversible error in the following language from the decision under review:

"But, says the plaintiff, I am not authorized by my charter to engage in the railroad business, and I cannot be compelled to engage in it. The answer is, that the plaintiff is the owner of a railroad; that it operated it as a common carrier and that it has continued to operate it as a common carrier, through the name of another; and the court is not called upon in this case to say whether plaintiff is lawfully operating a railroad or that it is violating its charter in doing so. That is a matter which rests with the attorney general, and the courts are without jurisdiction over that matter until it shall be regularly presented in a proper suit.

The revised statutes, as amended by Act No. 154, 1902, p. 288, authorize the forming of corporations for the following purposes: 'for the construction, working and maintenance of a railroad; canals, plank roads, bridges, ferries, transportation by pipe line, or other works of public improvement, whether within or with-

out the limits of the state; \* \* \* for the manufacture and transportation of lumber of all kinds; that no such corporation shall engage in mercantile, or commission, brokerage, stock jobbing, exchange or banking business of any kind.'

The act appears to permit the combination of railroading and the manufacture and transportation of lumber of all kinds in one charter in the State of Louisiana. The law is presumed to be the same in Minnesota.

And, it may well be considered that plaintiff's charter gave it the right to combine the two businesses in that section which reads in part: 'The general nature of its business shall be to manufacture, buy, sell, and deal in timber, logs, lumber, building materials and other personal property; \* \* \* to buy, sell, hypothecate, own and hold stock in other corporations; also to buy, own, lease, mortgage, sell, deal in and improve any real estate wherever situated, and to carry on any other lawful business necessary or proper for the accomplishment of the purposes of the corporation.'

A railroad is a very necessary appliance in carrying on the business of a large timber plant; which was one of the purposes of the plaintiff corporation. And it is evident that plaintiff so construed its charter rights when it bought the railroad and saw mill business from its predecessors in business." (Tr. 55.)

Long before this case was presented to the Supreme Court of Louisiana that court had decided that a limited company or an individual may own

and operate a railroad. In the case of Amos Kent Lumber and Brick Co. vs. Tax Assessor, 114 La. 862, the court was called upon to pass upon the character of a railroad similar to the Kentwood & Eastern Railroad. The owner of the railroad was Amos Kent Lumber and Brick Company, and the railroad was called Kentwood, Greensburg & Southwestern Railroad. The owners of the railroad claimed exemption from taxation under the provision in the Constitution of the State of Louisiana, exempting from taxation "for a period of ten years from the date of its completion any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1, 1906." While the railroad was owned by a lumber company, its use had been dedicated to the public, and the Supreme Court of Louisiana held that it was such a railroad as was meant in the article of the constitution referred to.

The Attorney General of the State obtained a rehearing and claimed that "it is only railroad companies or corporations proper that are entitled to the exemption provided by Art. 230 of the Constitution of 1898; that the plaintiff corporation having been established under Act No. 36, p. 27, of 1888, has no



authority to operate and maintain a railroad; and hence that it is not entitled to the exemption," (our underscoring) and the Court, answering this contention, said:

"The answer to this, as we think, is, the purpose of the framers of the Constitution was to encourage the building of railroads rather than the multiplication of corporations, and they accordingly declared that: 'there shall be exempt from taxation for a period of ten years from the date of its completion, any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1, 1904.' "

In the Amos Kent Lumber & Brick Company case, *supra*, the court further says:

"For the purpose of exemption, we are, therefore, of the opinion that it is wholly immaterial whether it is built and operated by a corporation, a private society, or individual. \* \* \* On the other hand, there can be no doubt that the word railroad is thus used in the sense in which it is commonly understood (i. e., as meaning a highway open to the public within the meaning of Art. 272, and the traffic upon which is regulated by the law applicable to common carriers), and that it has no application to a road owned or operated either by a corporation or an individual exclusively for its or his own purposes, or for the carriage of freight selected by or belonging to the owner or operator."

In the spring of the year 1906, the Kentwood & Eastern Railway Company, in its return of property made to the State Board of Appraisers of the State of Louisiana, of its leased lines, claimed exemption from taxation on fourteen miles of railroad constructed during the years 1898, 1900, 1901 and 1903. (Tr. 198-199.) When this exemption was claimed, the railroad was owned by Brooks-Scanlon Company, petitioner. The exemption, however, was claimed by the lessee, Kentwood & Eastern Railway Company, who, under the terms of the lease, was obligated to pay all taxes. Thus the public character of the railroad under discussion was recognized by the state taxing board, and the fact that the ownership was in a company whose principal business was hauling, manufacturing and selling its own lumber, did not divest the railroad of its public duty. It comes squarely under the doctrine announced by the Supreme Court of Louisiana in the Amos Kent Lumber & Brick Company case vs. Tax Assessor, supra.

A corporation may engage in a business which is reasonably necessary or incidental to the business expressly authorized by its charter.

The operation of a railroad is a necessary incident to the lumber business.

The Supreme Court of Louisiana, in the decision under review, says:

"A railroad is a very necessary appliance in carrying on the business of a large timber plant; which was one of the purposes of the plaintiff corporation. And it is evident that plaintiff so construed its charter rights when it bought the railroad and sawmill from its predecessors."

In this language the Supreme Court of Louisiana follows a principle which has repeatedly been announced by this court.

In the case of Jacksonville, Mayport & P. R. & Nav. Co. vs. Hooper, 160 U. S. 514, 40 L. ed. 515, Justice Shiras, with great clearness, discusses the incidental or auxiliary powers of corporations, and in announcing the opinion of the court, cites numerous authorities in support of the doctrine which has been followed by the Supreme Court of Louisiana in this case.

The question involved in the Hooper case, *supra*, was whether the Jacksonville, Mayport & Pablo Railroad & Navigation Company, as an incident to its main business as set out in its charter, was authorized to lease and operate a hotel. The court held that the transaction was incidental or auxiliary to the main purpose for which the corporation was organized, and therefore within its power, and legal. Justice Shiras cites the case of Attorney General vs. Great Eastern R. Co., L. R. 5 App. Cas. 478, in which Lord Chancellor Shelborne, after declaring his sense of the importance of the doctrine of ultra vires, said:

“This doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.”

In the same case, Jacksonville, etc., vs. Hooper, *supra*, the court cites approvingly the case of Davis vs. Old Colony R. Co., 131 Mass. 258, 272, 41 Am. Rep. 221, quoting the following from the decision:

“We know of no rule or principle by which an act creating a ~~corporation for certain specific~~ objects, or to carry on a particular trade

or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

It may be contended that its principal business is the manufacture and sale of lumber and for that reason it should not be compelled to engage in the railroad business. But the order of the Commission did not cause the petitioner to become owner of a railroad. It purchased the railroad with its eyes wide open. It cancelled the lease with its eyes wide open. The fact that its principal business is the lumber business does not affect the public's rights.

In Randolph Co. vs. Post, 23 U. S. 502, *supra*, the court said:

"It is not the less a railroad company within the statute authorizing municipal subscriptions because it is also a coal, or a mining, or a furnace, or a manufacturing company. By

the 3rd section of its charter it is vested with large power to carry on various kinds of mechanical and mining business, and is authorized to build and use vessels and barges in the transportation of coal, and for other purposes.

"If the Legislature had placed great restrictions upon its capacity as a railroad corporation, it might plausibly be objected that the purpose of a municipal subscription to its stock would be so far thwarted. Such purpose is to promote the settlement and increase the business and enhance the value of the property of the municipality and of its citizens by furnishing the means of passage to all wishing to come or to go, and providing a means of bringing in the produce of other regions and of furnishing a market for its own. The vast corn-growing lands of the State of Illinois depend for their value upon their convenience to a market. It is but a few years past that its rich production was almost valueless, for the want of railroads or canals to carry it to other regions, where it could have been sold to advantage."

\* \* \* \* \*

"It is not the less a railroad company within the statute authorizing municipal subscriptions because it is also a coal, or a mining, or a furnace, or a manufacturing company."

The Congress of the United States has recognized that the transportation business and the lumber business may be combined. The combination of carrier and lumber manufacturer is fully sanctioned by the

commodities clause of the act to regulate commerce, which is as follows:

“From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.”

This clause was discussed in the Tap Line Case, 34 U. S. 1, 58 L. ed. 1185, and referring to the action of Congress in enacting the commodities clause, the Court, through Justice Day, said:

“This declaration of public policy which is now part of the commerce act cannot be ignored in determining the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest, and the necessity of such roads was dwelt upon and set aside with

ample illustrations by Commissioner Prouty in his concurring opinion in this case."

In the case of Butte, Anaconda & Pacific Railway vs. Montana Union Railway (16 Mont., 504, 50 Am. St. Rep., 508; 31 L. R. A., 298), where a railroad, built primarily to serve a single industry, but later dedicated to public use, was first reviewed by a court, the following principles were discussed and applied:

"Frequently railroads are extended by spurs or lateral connections of main lines, or by independent tracks, into mining camps where but a single line is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and, when constructed, it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure



transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the lateral railroad built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but, by reason of the impracticability of expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the state, can discriminate against him by saying, 'We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?' "

In this case will be found a review of many decisions supporting the same principles.

In Ozark Coal Co. vs. Penn. Anthracite R. Co., 97 Ark. 495, 134 S. W. 634, the court held that the construction of a short line railway by a mining company so as to connect its mines with an existing rail-

way involves a public use, if such short line is necessary to a successful operation of the mines.

In Dismal Swamp R. Co. vs. Roper, 114 Va. 537, 77 S. E. 508, the Supreme Court of Virginia held that the mere fact that the primary purpose of a railroad is to accommodate a particular enterprise is not a controlling test in determining its right to exercise the right to eminent domain. This case and those cited in the elaborate opinion of the court all serve to conclusively show that the business of a common carrier, once undertaken, is clothed with extraordinary rights, which exist by virtue of the public occupation, and corresponding liabilities, which cannot be put aside against the will of the State.

The question whether the corporation has exceeded its powers as defined by its charter concerns only the state within whose limits the property is situated.

“It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so.”

Fritz vs. Palmer, 132 U. S. 282, 32 L. ed. 317.

Cowell vs. Colorado Springs Co., 100 U. S. 55, 60, 25 L. ed. 547.

Jones vs. Habersham, 107 U. S. 174, 188, 27 L. ed. 401, 406.

The Supreme Court of Louisiana has applied this rule in other cases.

Southern Lumber Co. vs. Holt, 129 La. 273.

The decision of the lower court that the charter of petitioner gave it the right to combine the two businesses of railroading and the manufacture and transportation of lumber of all kinds, and, that the question whether in operating a railroad the petitioner is violating its charter rests with the Attorney General, does not present a federal question so as to justify this court in reversing the decision under review.

The Supreme Court of the State of Louisiana having interpreted its own Constitution and laws, its decision upon such state of facts raises no federal question.

In the case of Turner vs. Board of Commissioners, 173 U. S. 461, 43 L. ed. 768, Mr. Justice Peckham, delivering the opinion of the court, says:

“But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because this being a writ of error to the state court, we cannot take jurisdiction over the allegation that a contract has been impaired by a decision of that court, when it appears that the state

court has done nothing more than construe its own Constitution and statutes existing at the time the bonds were issued, there being no subsequent legislation touching the subject. We are, therefore, bound by the decision of the state court in regard to the meaning of the Constitution and laws of its own state, and its decision upon such a state of facts raises no federal question."

#### IV

#### CONCLUSION.

It is within the sovereign powers of the State to name the conditions under which corporations may enter and do business in the state. Among these powers is the right to govern and regulate railroads, to control corporations engaged in public service, to amend and even repeal charters. The Railroad Commission of Louisiana, as the State agency in Louisiana, entered an order compelling a reasonable service to be given the public by the owners of the Kentwood & Eastern Railroad. The Brooks-Scanlon Company, petitioner, has made no effort to comply with the order, leaving the public to suffer the inevitable losses which have been shown to follow the road's abandonment. Decline in land values, decreased business, extra heavy expenses in reaching distant

shipping stations by truck or wagon, are only some of the tangible signs by which the steady but certain emasculation of a splendid agricultural section of the State of Louisiana is being accomplished through the failure of the owners of the Kentwood & Eastern Railroad to operate the railroad.

The time selected for the abandonment of the railroad by the Brooks-Scanlon Company was during a period of depression in transportation affairs hitherto unknown in the United States. The railroads operated by the Government were showing heavy deficits and the Railroad Administration at the end of the year 1918 showed expenses of a billion dollars in excess of income, yet no one has ever suggested that because there was a deficit from the operations of the railroads of the United States, both individually and collectively, transportation service should be abandoned. Many plans have been offered for reorganization of the railroads but every plan suggested has contemplated a continuance of the transportation service. These are matters of such general knowledge as to command the judicial attention of the court.

And the duty resting upon the Brooks-Scanlon Company, owners of the Kentwood & Eastern Rail-

way Company, to operate its railroad, or to provide for its operation through a lessee, is as great as if the Kentwood & Eastern Railroad were owned by the Pennsylvania System.

“It is the right of the public to use the road’s facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.” The Tap Line Case, supra.

The Supreme Court of Louisiana has committed no error. The order complained of is a legal exercise of the constitutional powers of the Railroad Commission of Louisiana. The petitioner having elected to become the owner of a common carrier railroad must perform its duties as a common carrier either directly or through its selected agencies. Its charter was broad enough to include the purchase of a common carrier railroad in full operation, and to authorize it to assume the position of lessor, in a lease compelling the lessee to maintain the said railroad in reasonable repair and condition, to operate it, and to use all reasonable efforts to foster and increase its business. The same charter cannot be used as a bar to carrying on the duties assumed by

Brooks-Scanlon Company, petitioner, now that it has taken its railroad back into its own possession.

We submit that the case should be dismissed and the decision under review affirmed.

Respectfully submitted,

A. V. COCO,

Attorney General of Louisiana;

W. M. BARROW,

Assistant Attorney General of Louisiana;

Solicitors for

Railroad Commission of Louisiana,

Respondent.

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IN THE

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1919.**

**No. 386.**

**BROOKS-SCANLON COMPANY, PETITIONER,**

**vs.**

**RAILROAD COMMISSION OF LOUISIANA, RESPONDENT.**

**ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
LOUISIANA.**

**BRIEF ON BEHALF OF THE RAILROAD COMMISSION  
OF LOUISIANA IN REPLY TO BRIEFS FILED ON  
BEHALF OF BROOKS-SCANLON COMPANY, PETI-  
TIONER.**

**A. V. COCO,**  
*Attorney General of Louisiana;*  
**W. M. BARROW,**  
*Assistant Attorney General of Louisiana,  
Solicitors for Railroad Commission of Louisiana.*





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TIONER.**

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I.

Petitioner has filed three briefs in this case. The second supplemental brief was handed to counsel for respondent on his departure for Washington, and therefore that portion

of this reply which deals with the second supplemental brief on behalf of petitioner is somewhat hurriedly prepared, and apologies are offered for its form. However, statements are made in the second supplemental brief which require reply in order that the Court may see the fallacy of the arguments which are presented.

Dealing with the briefs of petitioner in their reverse order, we first take up the second supplemental brief.

The first proposition presented in this brief is as follows (page 4):

"The Brooks-Scanlon Company, petitioner herein, never at any time itself operated the Kentwood & Eastern Railroad."

In support of this statement certain facts are set forth in the statement made before the Railroad Commission of Louisiana on January 22, 1918, by Judge R. R. Reid, attorney for the Kentwood & Eastern Railway Company.

The Court's attention is called to the fact that the entire statement made by Judge Reid was on behalf of the Kentwood & Eastern Railway Company, and not on behalf of the Brooks-Scanlon Company, petitioner in this case.

It will be noted that the sole and only reason given to the Railroad Commission on that date, viz., January 22, 1918, by the attorney for the Kentwood & Eastern Railway Company was that—

"The Brooks-Scanlon Company served notice on the Kentwood & Eastern Railway Company of their intention to avail themselves of the stipulation in the lease to cancel it on six months' notice; so that on the

22d day of April our lease will, by its terms, be cancelled."

Following this statement by the attorney for the Kentwood & Eastern Railway Company, the Commission submitted to its attorney the question upon which his opinion was re-

quested. The question did not involve the authority of the Railroad Commission of Louisiana to require the Brooks-Scanlon Company to operate its railroad, but, as will be seen by reference to the opinion printed in the transcript, page 243, and in the second supplemental brief, page 11, the sole question upon which the opinion was given was:

"The power and authority of the Railroad Commission of Louisiana to prevent the discontinuance of service over a portion of its track operated under lease."

Therefore, if counsel for petitioner depends upon the statement made before the commission by the attorney for the Kentwood & Eastern Railway Company on January 22, 1918, to support his theory that the Brooks-Scanlon Company, petitioner herein, did not operate the railroad at any time, we submit that he is in error, because the question of the operation of the Kentwood & Eastern Railroad by the Brooks-Scanlon Company was not involved, was not in issue at that time, and was given no consideration by the Railroad Commission of Louisiana.

On page 2 of the second supplemental brief filed by petitioner, in the syllabus, it is stated:

"The Assistant Attorney General himself advised the Railroad Commission that it could not compel the Brooks-Scanlon Company to operate this railroad."

While the opinion itself simply crept into this record by virtue of its having been a part of the record before the Railroad Commission of Louisiana, it affords the petitioner an opportunity to direct the Court's attention to a matter which is not directly pertinent to this case. Nevertheless, since the opinion is in the record and counsel has called attention to it, we direct the Court's attention to the fact that the subject which was being considered was the right and authority of the Railroad Commission of Louisiana to compel the Kent-

wood & Eastern Railway Company to continue operation over that portion of its railroad leased by the Brooks-Scanlon Company after the date of the cancellation of the lease by the Brooks-Scanlon Company. It is true that in a paragraph of the opinion it is stated that—

“If the Brooks-Scanlon Company was chartered as a railroad company, or had undertaken to perform the services of a common carrier, it could be required to give the service over its railroad after the expiration of the lease to the Kentwood & Eastern, but from the information you have furnished me it appears that the Brooks-Scanlon Company is not permitted, under this charter, to perform a railroad service, but *is expressly prohibited under its charter from operating a railroad.*”

It is therefore quite evident that the opinion referred to, in so far as it concerned the Brooks-Scanlon Company, was based upon the assumption that its charter expressly prohibited it from operating a railroad, an assumption which subsequent investigation proved to be entirely erroneous.

The opinion, in the main, dealt with the question of jurisdiction of the Railroad Commission of Louisiana to compel the operation of a railroad over a leased portion of its track. Immediately following the notice sent out by the Kentwood & Eastern Railway Company, the chairman of the commission notified some of the complaining parties as follows:

“You can rest assured that had this commission any power or authority in this matter, every effort would be made to assist the people affected by the discontinuance of this line of railroad, but under the circumstances it appears there is nothing that can be done” (Transcript, 240).

And in this connection the Court's attention is again directed to the case of *The State ex rel. Tate vs. Brooks-Scanlon Company*, 143 La., 539; 78 So., 847. A full discussion

of this case will be found on pages 5 and 6 of the original brief on behalf of the Railroad Commission of Louisiana opposing the petition for a writ of certiorari.

The commission itself, in its order in controversy, distinctly stated that authority to discontinue the railroad had not been given. Its language is very definite on this point. The following is taken from the order:

"The letter and authorities which have been referred to heretofore are said by the defendants in this case to constitute orders or authorities on the part of this commission to discontinue the railroad. *Such is not the case.* The Railroad Commission has never acted upon any application to discontinue the railroad further than to advise the Kentwood & Eastern Railway Company that it had no rule to prevent its discontinuance. Our letter addressed to the attorney of the Kentwood & Eastern Railway Company was simply a disclaimer of jurisdiction" (Tr., 7).

The attitude of the commission is thus clearly outlined. Believing that the courts were the proper forums in which to test the question which of two companies should continue the operation of a common carrier railroad after the expiration of a lease, the State, on the relation of one G. M. Tate and others, filed a suit against the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company at their domiciles. The State exhausted its remedies in these direct proceedings before the courts in the case of *State ex rel. Tate vs. Brooks-Scanlon et al.*, *supra*, and the question of jurisdiction was raised by the petitioner in this case, the Brooks-Scanlon Company, and decided by the Supreme Court in its favor. The jurisdictional question having been settled, the Railroad Commission of Louisiana did what its chairman stated it would have done at the outset, viz., began proceedings on its own motion to compel the operation of the railroad. We do not think there is any inconsistency whatever in the procedure which antedated the proceedings before the Railroad

Commission. The whole question was one of jurisdiction, which had to be determined before the commission could consistently proceed in a matter where its jurisdiction was in question.

In a statement made before the Railroad Commission at the incipieny of the case, the attorney for the Kentwood & Eastern Railway Company had stated that—

“Subsequently this company (Brooks-Scanlon Company) being practically forbidden, under the terms of its charter, to operate a railroad, leased the property to a new Louisiana corporation, known as the Kentwood & Eastern Railway Company, for a term of twenty years, and subject to the right of the lessee or lessor to terminate the lease at any time upon six months’ notice.”

It was therefore in accordance with the information furnished by the attorney for the Brooks-Scanlon Company, that the charter of that company prohibited it from operating a railroad, that the opinion of the assistant attorney general referred to was rendered, in so far as it affected or referred to the Brooks-Scanlon Company.

## II.

It is contended by the petitioner that the operation of the railroad will necessarily be at a loss.

On pages 17, 18, 19, and 20 of the second supplemental brief, figures are given which are intended to show this result. Most of these figures are estimates made by counsel for petitioner. There was evidence of the value of the railroad property belonging to the Brooks-Scanlon Company when the case was heard before the commission, but no additional testimony on this point was presented on the trial before the Court.

**The investment in the Kentwood & Eastern Railroad has been repaid in full with a balance over and above the original cost.**

The Brooks-Scanlon Company took over the Kentwood & Eastern Railroad with its obligations, rights, franchises and contracts on July 1, 1906. The Brooks-Scanlon Company signed the lease on that date, under which it was to receive, among other valuable considerations, the sum of \$10,000 per annum. The Brooks-Scanlon Company cancelled the lease on April 22, 1918, having previously given notice that it intended to do so.

For a period of twelve years, therefore, the Brooks-Scanlon Company received \$10,000 per year, or a total of \$120,000 for the twelve-year period. The road and equipment originally cost, according to estimates in the evidence, \$135,000, and deducting the amount received from the sale of equipment, the cost of the roadbed and track to the Brooks-Scanlon Company was \$100,000.

In the twelve years the road has been operated under the ownership of the Brooks-Scanlon Company it has, therefore, paid its owners 120 per cent, or 10 per cent a year on its original cost, and \$20,000 additional.

If the Brooks-Scanlon Company had allowed the lease to run its full life, twenty years, the rental would have paid for the railroad in full and left a balance of \$100,000, or a net interest on its original investment of 5 per cent annually.

As the property stands today, the Brooks-Scanlon Company is not out one dollar, since it has been repaid in full its original investment, earning a reasonable return on that investment, and still owns the property.

The Brooks-Scanlon Company, petitioner, contends again in the second supplemental brief that the Supreme Court of the State of Louisiana has inadvertently held that—

“Plaintiff has not petitioned the Railroad Commission to permit it to discontinue its business of rail-



roading, and until it has done so and the Commission has acted, the courts are without jurisdiction of the matter. State *ex rel. Tate vs. Brooks-Scanlon Company et al.*, 143 La., 539; 78 So., 847. The Kentwood & Eastern Railway Company has made such request, but it is not, nominally, a party to this suit."

It is insisted that due application was made by the Brooks-Scanlon Company to the Railroad Commission for permission to discontinue operation of its narrow-gauge railroad, and this insistence is based upon the answer which was filed by the Brooks-Scanlon Company before the Railroad Commission. This statement, however, is positively refuted by the Brooks-Scanlon Company in a declaration which it makes in the application filed in the Supreme Court of the State of Louisiana for a rehearing. In its application for a rehearing the Brooks-Scanlon Company says (Tr. 60):

"19. If the Court means in the last paragraph of its opinion that it is without jurisdiction in this matter, it is in error, for its jurisdiction begins where the Commission has acted, and in this case it certainly has acted, for we are here before the Court contesting its action (Order No. 2228). *The Brooks-Scanlon Company has not, as remarked by the Court in this paragraph, requested permission to discontinue; as it had never begun it could not ask permission to discontinue.*"

This statement in the application for a rehearing signed by the attorney for the Brooks-Scanlon Company is further supported by the order of the Railroad Commission of Louisiana, in which it is stated:

"The letter and authorities which have been referred to heretofore are said by the defendants in this case to constitute the orders or authorities on the part of the Commission to discontinue the railroad. *Such is not the case.* The Railroad Commission has never acted upon any application to discontinue the railroad further than to advise the Kentwood & East-

ern Railway Company that it had no rule to prevent its discontinuance. Our letter addressed to the attorney of the Kentwood & Eastern Railway Company was simply a disclaimer of jurisdiction" (Tr., 7).

With these facts clearly shown by the record, there should be no further controversy over the question whether the Brooks-Scanlon Company applied to the Railroad Commission for permission to discontinue the operation of its railroad. It has not done so. In fact, it is here contending that it does not have to do so, and its separate answer before the Railroad Commission of Louisiana, printed on pages 278, 279, 280, and 281 of the transcript, clearly defines its position.

#### **Revenues and Expenses of the Kentwood & Eastern Railroad.**

The statement opposite page 256 in the transcript shows the operating revenues, operating expenses, and deductions from revenues, consisting of taxes and rentals of the Kentwood & Eastern Railroad for the year 1917. These figures were filed with the Railroad Commission of Louisiana, when the case was being heard, by the Kentwood & Eastern Railway Company.

It is claimed in the second supplemental brief that the value of the property upon which the Brooks-Scanlon Company is entitled to earn a fair return, for the purposes of argument, is \$190,000. It is further claimed that a return of 7 per cent on \$190,000 is the amount which should be earned by the Brooks-Scanlon Company before it should be compelled to operate this railroad.

Seven per cent on \$190,000 is \$13,300.

We do not admit the value of the railroad to be as claimed by petitioner's counsel. There is no evidence in the record to substantiate these figures. Mr. Keyes' estimate, referred to by petitioner, as shown on page 176 of the transcript of record, is, "A rough estimate that it would cost us about

\$10,000 per mile" to build such a road as the Kentwood & Eastern Railroad. However, there is no question involved in this case of the building of the railroad. It was in existence at the time the case was tried, and the evidence plainly showed that it had not cost the Brooks-Scanlon Company more than \$100,000, and had been turned over to them on April 22, 1918, "Fully as good, if not better," than it was when it was leased to the Kentwood & Eastern Railway Company on July 1, 1906.

The lease itself required the lessee to "keep and maintain said railroad in reasonable repair and condition during the continuance of this lease," and if the Brooks-Scanlon Company accepted the railroad in a run-down condition, it was simply releasing the Kentwood & Eastern Railway Company from an obligation which it could have enforced under the terms of the lease.

It is claimed by the petitioner that the lease for the year 1917 for the operation of the Kentwood & Eastern Railroad amounted to \$16,261.22, or \$1,355.19 per month, and it is further contended that this shows the annual loss which may reasonably be expected by the Brooks-Scanlon Company if it is compelled to operate the railroad. As we have already pointed out in briefs heretofore filed, no such loss would occur if the property were operated by its owners. As stated before, the annual rental of \$10,000 would immediately cease, thus reducing the net deficit, on the basis of the figures for the year 1917, to \$6,261.22, or \$521.81 per month.

No allowance has been made for the reduction in operating expenses due to the discontinuance of the log trains, and the reduced service, and no consideration has been given to the increased rates permitted by the order of the commission. These items would help to overcome the small deficit of \$521.81 per month, and turn the net result into a profit. There is nothing in the record which could justify the Court in reaching a different conclusion.

The commission's order permits a 25 per cent advance

in all rates, with a minimum charge of \$15 per car. When this case was tried in court, no effort was made by the Brooks-Seaton Company to show that such an advance in rates would not produce revenue sufficient to overcome a deficit in the operation of the railroad. It is now contended, however, in petitioner's supplemental brief, pages 6 and 7, that—

"Figures in the record show conclusively that the present railroad has been operated at a very material loss, and by examining the figures it can be easily ascertained that even an increase of 25 per cent in the receipts would still leave the receipts less than the expenses."

The statement of operating revenues and operating expenses, which are referred to by petitioner on pages 17, 18, 19 and 20 of the second supplemental brief, and printed opposite page 256 of the transcript of record, shows the following for the year 1917:

Operating revenues.....	\$57,525.38
Operating expenses .....	60,732.42

To the operating expenses have been added "taxes and rentals" for the year 1917, amounting to—

Taxes .....	\$3,054.69
Rentals .....	10,000.00
Total .....	<u>\$13,054.69</u>

Which amount is included in the claimed deficit. But "rentals" cannot be paid by the Brooks-Seaton Company on its own property. So that the deficit should be reduced by the sum of \$10,000, leaving the trifling loss of only \$6,232.73 for the year 1917, as previously pointed out.

An increase of 25 per cent in revenues allowed by the

order of the Commission would produce the following result, based upon the 1917 figures:

Operating revenues, 1917.....	\$57,525.38
25 per cent advance.....	14,381.34
<hr/>	
Total revenues with advance added.....	\$72,907.73

This would have left an excess of revenues over operating expenses of \$12,175.31, and after deducting the taxes for the year 1917, \$3,054.69, there would have been a net profit of \$9,120.62, an amount equal to 6.7 per cent on the original valuation, or on the original investment of \$135,000.

The figures for the first four months in January, 1918, cannot be fairly taken as indicating the results from the operation of the railroad under proper conditions. Shipping all along the line had been completely demoralized by the discouraging notices given to all parties, by the irregularity of train service, and by the general understanding among the shippers that the service would be discontinued. The last month of operation, May, 1918, was under an agreement by which it was understood that the Brooks-Scanlon Company would run trains twice a week, to clean up a few shipments which had already been placed at a few of its stations. The shippers were, however, notified that they need not bring any further shipments to the stations, as they would not be carried. In fact, the through tariffs had been cancelled. Shippers on connecting lines had thereby received public notice that no further shipments would be accepted for points on the Kentwood & Eastern Railroad, and the result was the same as if the service had been completely abandoned. We refer again, later, to the affidavit reproduced in petitioner's brief.

There is still another source from which the Kentwood & Eastern Railroad may obtain additional revenue should it make the proper effort, supported by the proper showing. On page 191 of the transcript it will be noted that the Kent-

wood & Eastern Railroad, was, at the time of the hearing before the commission, receiving 25 per cent as its division out of its joint through rates in connection with the Illinois Central and the New Orleans & Great Northern railroads. Every remedy is provided for the apportioning of divisions between railroads participating in joint through rates, both by the Federal and State Commissions, and until some effort has been made by the Brooks-Scanlon Company to secure additional revenue from this source as well as from all other sources available, it should not be heard to complain that it cannot secure sufficient revenue to pay for operating the railroad.

The Brooks-Scanlon Company operates a sawmill at Kentwood and controls its own shipments of lumber. During a certain period of operation of the Kentwood & Eastern Railroad, it routed shipments from Kentwood to Warnerton, and thence over the New Orleans Great Northern Railroad to destination. During the period from January to May, 1918, these shipments were discontinued. There is no conceivable reason why the Brooks-Scanlon Company should not continue to route some of its shipments of lumber in this same manner and thus give the Kentwood & Eastern Railroad a portion of its lumber tonnage. On the other hand, there is an excellent reason why this should be done. When shipments are made via Kentwood and the Illinois Central Railroad the Kentwood & Eastern Railroad performs the transfer service and gets the transfer allowance, while on business moving via Warnerton and the Great Northern Railroad the Great Northern Railroad performs the transfer itself (Tr., 192).

At page 19 of the second supplemental brief counsel uses the maintenance figures for the months of 1917 in his calculations. The maintenance figures would, to some extent, be affected by the density of traffic, and it has been shown that under the order of the Commission the service may be reduced. There is no evidence in the record to show what

the cost of such reduced service would be, because as yet no schedule has been submitted to the Commission of a service which would meet the requirements of the order.

On page 22 of the second supplemental brief certain testimony is quoted from the transcript, from which it is made to appear by Mr. Keyes that there is not sufficient business on the railroad to pay for its operation. There is direct evidence to the contrary given by shippers along the railroad before the commission, and Mr. Keyes himself testified before the Interstate Commerce Commission in the Tap Line case in 1911 that there were numerous turpentine mills, seventeen cotton gins and a large farming section served by this same railroad (Tr., 70, 74, 75). (See Tr., 30, 33, 34, 37, 38, 40, 94, 98, 99, 100, 101, 102, 139.)

### III.

It is contended by the petitioner that it is not under any obligation to operate a railroad; that its charter, if it permitted the operation of a railroad, was of such a character as to carry with it the right at any time to discontinue such operation. In other words, it enjoyed a permissive charter only.

In the case of *Buttler vs. Cincinnati, Covington & Erlanger Ry. Co., et al.*, 180 Ky., 407; 203 S. W., 199; L. R. A., 1918-E, 315, it is said:

"The performance of any legal obligations required of it by the statute applicable thereto is also a part of the undertakings of every corporation, and hence it is said that the charter as they are now organized consists of its articles of incorporation and the laws applicable thereto. The law enjoins upon every corporation every specific duty which is imposed upon it either by its articles of incorporation or by the general statute in force and applicable to the subject where the duty is enjoined either in express terms or by fair and reasonable implication. 1 Rolf, Railways, 644; State *ex rel* Atty. Gen. *vs.* Southern Minnesota R. Co., 18 Minn., 40; Gil., 21."

It may be true that, in so far as purchasing the railroad was concerned, the charter of the Brooks-Seaton Company was permissive in its terms, but having exercised its permissive authority when it purchased the railroad, it became at once obligated with the continuing duty of operating it.

A number of cases are cited in the various briefs filed by the petitioner which relate to the power of States to make rates for public-service corporations. The Federal question most frequently raised in these cases arises under the 14th Amendment, on the ground that the rates made or sought to be enforced take the property of the corporation without due process of law, because they do not afford revenue sufficient to pay the cost of operation and a fair return upon the investment used in public service. Clear distinctions have been made between this class of cases and those requiring the performance of an obligation assumed by virtue of the engagement in a public service.

#### **Keyes' Affidavit.**

There is printed on pages 25 and 26, petitioner's second supplemental brief, an affidavit by George A. Keyes, dated July 20, 1918.

Under an agreement between counsel a few special trips were made by the Kentwood & Eastern Railroad, after the case was heard by the commission. These trips were to gather up a few shipments of potatoes which had been raised in the neighborhood of Mt. Hermon.

It was distinctly understood that these trips were to be considered as if not made. This agreement is of record, in the evidence, page 104 of the transcript, and is as follows:

"Mr. Barrow: Judge Reid, I think we may as well agree here that for the purposes of this case those extra trips may be considered as if they never had been made. I mean, I think it should be considered



that this is the situation so far as this case is concerned.

"Mr. Reid: Yes, since the 22nd of April."  
(Tr., 104.)

Notwithstanding this agreement of record, an affidavit by George A. Keyes, dated July 20, 1918, was sent to the commission, and received by it July 22, 1918, and found its way into the record.

Petitioners now seek to make capital out of this affidavit and say in their second supplemental brief, page 24:

"The proof above adduced seemed conclusive, but to make assurance doubly sure, the railway as an experiment, by agreement of counsel, without prejudice, tried running trains on a bi-weekly schedule from July 1st, 1918, to July 19th, 1918, with the results shown by the following affidavit and tabulation, which are not contradicted or disputed in any way."

Why should they be? The agreement was on the record "that for the purpose of this case those extra trips may be considered as if they had never been made" (Tr., 104).

Counsel who represented the Kentwood & Eastern Railway Company before the commission insisted that this agreement be observed (Tr., 121).

#### **Authorities Cited by Petitioner.**

We will now discuss the cases which have been cited and point out wherein they do not apply to the issue which is presented in this case. In the briefs which we have heretofore filed we have cited numerous authorities in support of the order of the Railroad Commission of Louisiana here in contest, and the decision of the Supreme Court of Louisiana upholding the reasonableness of that order. While counsel for the petitioner refers to the fact that the decision of the Supreme Court of Louisiana was by a divided court, and

that the trial judge decided against the commission's order, he fails to point out that the commission's order itself was decided by three commissioners, after a full hearing and investigation, and upheld by the Supreme Court of the State of Louisiana. The decisions of the Supreme Court of the State of Louisiana which we have cited in our previous briefs show the solemnity with which the law surrounds the acts of the commission, giving to it the dignity of a court.

The following cases are cited in petitioner's various briefs:

*The North Dakota Case.*

Petitioner relies upon the case of *Northern Pacific Railroad Co. vs. North Dakota ex rel. McCue*, 236 U. S., 585; 59 L., 735, to support its contention that because for a very short period of time, the business of its railroad, separately considered, showed a loss.

The North Dakota case dealt with maximum intrastate rates, fixed by the legislature of North Dakota for the transportation of coal in carload lots.

The Court held that a State may not compel a carrier to establish a rate upon a particular commodity which is less than reasonable, in order to build up a local enterprise, but this was far from saying that because a corporation operating a railroad showed a loss for a very short period of time, that it may abandon its property and decline to further carry out its assumed public duty. On the contrary, Mr. Justice Hughes stated the principles applicable to the public duty of railroads, very clearly, as follows (p. 595; L. Ed., 751):

"The railroad's property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which were in the nature of

its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. *These duties are properly called public duties and the State, within the limits of its jurisdiction, may enforce them.* The State may prescribe rules to insure fair remuneration, and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience."

Surely, there is nothing in that language to imply that a common carrier railroad may abandon its railroad against the will of the State, and "fold its tent like the Arab, and silently steal away."

In the North Dakota case, the Court was careful to distinguish between the limitations upon the State's power in fixing a rate on a particular commodity, in fixing an entire schedule of rates, and cited numerous decisions in which this distinction had previously been made. Among the decisions cited in the *North Dakota case* was the case of *Interstate Consolidated Street Railway Company vs. Massachusetts*, 207 U. S. 79, 84; 52 L. Ed., 111, 114; 12 Ann. Case, 555, in which the decision "rested upon the ground that the charter of the company was accepted subject to the obligation imposed by the statute there in question."

The case of *Atlantic Coast Line R. Co. vs. North Carolina Corporation Commission*, 206 U. S., 1; 51 L. Ed., 933; 11 Ann. Cas., 398, was cited at length. This case involved

"the validity of an order of the State commission requiring the railroad company so to arrange its schedule of transportation between two points as to make connection with through trains. It was held that the order merely compelled the carrier to perform a duty which fell within the scope of the obligation it had assumed."

"So far from the case being an authority for the conclusions that the validity of a particular rate can-

not in any case be challenged if the returns from the entire intrastate operations are deemed to be adequate, the Court, in the course of its opinion, expressly conceded the contrary."

In the *Atlantic Coast Line case*, *supra*, the Court, after stating two hypothetical cases where rates imposed by State authority would be so unreasonable as to constitute a violation of the due process and equal protection clauses of the 14th amendment, said:

"Neither of these concessions, however, can control the cause in hand, since it does not involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned wholly with an order directing a carrier to furnish a facility which it is a part of its general duty to perform for the public convenience."

The case of *Chicago, Milwaukee & St. Paul R. Co. vs. Wisconsin*, 238 U. S., 491; 59 L. Ed., 1423, cited by petitioner, has no bearing upon this case. The case dealt with a Wisconsin statute prohibiting sleeping-car companies from letting down an unengaged upper berth when the lower berth in the same section was occupied. The statute was held to be violative of the 14th Amendment of the Federal Constitution, because it took the space in the sleeping car without pay and gave it to the occupant of the lower berth for his free use until actually occupied by another passenger.

The *Railroad Commission case, Stone (Miss.) vs. Farmers Loan & Trust Co.*, 116 U. S., 331; 29 L. Ed., 636, 644, dealt with a statute of the State of Mississippi providing for the regulation of freight and passenger rates on railroads in the State of Mississippi and creating a commission to supervise the same, which the Farmers Loan & Trust Company, a New York corporation, sought to enjoin. The question involved was the right of the State to fix and regulate rates for the

transportation of passengers and freight. There was no question involving the performance of an obligation to the public by operating the service it had assumed and abandoned. The Court does not intimate that such a duty cannot be enforced by the State.

*Smythe vs. Ames*, 169 U. S., 466; 42 L. Ed., 819 (cited on page 16, petitioner's original brief) :

This was one of the first of the rate cases decided by the Supreme Court of the United States.

The legislature of the State of Nebraska, in 1893, passed an act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." Suit was brought by various interests, contesting the act of the Nebraska legislature on the ground of its unconstitutionality. Mr. Justice Harlan delivered the opinion. It was held, among other things, that a State cannot fix rates so low as to deprive a carrier of its property without due process of law or so as to confiscate the property, in violation of the 14th Amendment.

But this is not the question involved in the case at bar. Indeed, in *Smythe vs. Ames*, the Court lays down rules for the guidance of those seeking light, where the question of the duty to serve the public reasonably is the paramount issue. The Nebraska statute reduced the existing rates on the railroads in the State of Nebraska fully 60 per cent.

In speaking of the duty of the railroads to reasonably serve the public, the Court, in *Smythe vs. Ames* (545, 546), says:

"A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unrea-

sonable charges for the service rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."

*Minnesota Rate Case* (Simpson *vs.* Shepard), 230 U. S., 433; 57 L. Ed., 1511 (cited on page 13, petitioner's original brief):

As its name implies, this case involved rates, fixed by the State of Minnesota, the enforcement of which was enjoined. Mr. Justice Hughes delivered the opinion. Many of the principles announced by the Court in previous rate cases were reaffirmed, and clear definitions were given on rate subjects which had bothered the profession for many years. But nowhere in the opinion is it indicated that a common carrier may absolutely disregard its public duty, without making an effort to meet the exigencies of the situation into which it has voluntarily placed itself. For it cannot be forgotten that the case at bar presents an unique situation, which was not brought about by the action of any governmental authority, but by the deliberate action of the corporation owning the Brooks-Scaulon railroad, and by which it has forced itself into a position where it may claim protection under the 14th Amendment.

In the *Minnesota Rate Case* the Court exhaustively reviews the relations between Federal and State control over interstate and intrastate commerce, and in its greater aspect the

case may be said to pave the way for the elimination of the confusion so long existing between the exercise of the conflicting powers of State and Federal bodies clothed with regulative authority.

But on the question of the right of the common carrier to abandon its franchise and disregard its duty in the face of findings by the State authority that such a duty is an essential of its assumed obligation, the *Minnesota Rate Case* is silent.

The citation in petitioner's brief is preceded in the opinion by the following clear statement of the issue:

"Here we have a general schedule of rates, involving the profitableness of the intrastate operations of the carrier, taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due protection of the law and denied the equal protection of the laws."

In the case at bar there is no complaint that the rate schedules are unreasonable. There is no complaint at all about the rates. There is an intimation in petitioner's supplemental memorandum of authorities, that the 25 per cent increase in rates allowed by the commission's order could not become effective, and if effective would not afford the needed relief.

The 25 per cent increase could be applied on the Kentwood and Eastern Railroad as well as on the other railroads in nearby territory, which are, and were when the commission's order was issued, under Federal control, and subject to the general rate advance allowed all Federal controlled railroads, the validity of which was upheld by this Court in the case of *Northern Pacific Railroad Co. vs. North Dakota* (1919 Adv. Ops., 533), decided June 2, 1919.

Mr. Keyes testified before the Railroad Commission (Tr., 212) that he had put the 25 per cent rate advance into effect on the date of the hearing, referring to the standard-gauge

part of the Kentwood & Eastern Railroad. No reason can be conceived why the same advance could not have been made effective on the narrow-gauge railroad. None was offered in court when the case was tried.

*Missouri Pacific Ry. Co. vs. J. W. Tucker*, 230 U. S., 340; 57 L. Ed., 1507 (cited on page 12 of petitioner's brief):

This was a case in which the State of Kansas sought to enforce, through legal proceedings, a penalty prescribed by a Kansas statute for overcharges by carriers. The point decided was that the imposition by the Kansas laws of a liability of \$500 as liquidated damages, together with a reasonable attorney's fee for every charge by a common carrier, in excess of the rates therein fixed for the shipments of oil between points in the State, takes property without due process of law, contrary to the 14th Amendment.

The Court, however, in speaking of the carrier's primal obligation to serve the public, said:

"Being a common carrier, the company is not at liberty to decline shipments of oil. It must receive and carry them when offered, and must be ready to name shippers the rates at which that service may be rendered."

There is no language in the decision which, even by fair implication, would permit the conclusion that a carrier may abandon its assumed public duty.

*Southern Railway Co. vs. St. Louis Hay & Grain Co.*, 214 U. S., 301; 53 L. Ed., 1004 (cited on page 10, petitioner's brief):

There is nothing in this case which has any bearing upon the right of a common carrier railroad, against the will of the State, and when it cancelled a profitable contract, which afforded it an earning of 10 per cent annually on the capital



invested in the railroad, to abandon its public duty and take up its railroad.

The case merely holds that a railway carrier is justified in receiving some compensation in addition to the cost of loading cars in transit to the shipper's warehouses at an intermediate point for unloading, inspection and reloading, and taking away the reloaded cars, whether or not the carrier is under any obligation to extend such privilege to shippers.

*Mississippi Railroad Commission vs. Mobile & Ohio R. R. Co.*, 244 U. S., 391; 61 L. Ed., 1216 (cited on pages 9, 10, petitioner's brief):

This case was a case in which orders of the Mississippi Railroad Commission directing the restoration to service of certain passenger trains were contested. It was held that the reasonableness of the order could not be made to turn on what the commission estimated the "out-of-pocket" cost, the immediate outlay in wages, and fuel to operate such trains. Mr. Justice Clarke delivered the opinion:

At the very outset of the opinion, Mr. Justice Clarke recognizes "the depression of business incidental to the European war," and refers to the effect of this depression on the earnings of the Mobile and Ohio Railroad.

The first principles stated in the opinion are in affirmance of the law we rely upon in this case. They are these:

"A State may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation" (p. 390) and,

"Under this power of regulation a State may require carriers to provide reasonable and adequate facilities to serve not only the local necessities, but the local conveniences, of the communities to which they are directly tributary" (Tr., 391).

"And such regulation may extend in a proper case to requiring the running of trains in addition to those provided by the carrier even where this may involve some pecuniary loss."

The rest of the decision turns upon the unreasonableness of the requirement of the Mississippi Commission that the trains that were discontinued be reinstated. The order was made according to the Court's view, upon evidence "impres- sively meager and inadequate in character." The Court in the closing paragraph agreed with the lower court, "that the order of the Commission at the time and under the circum- stances when it was issued was arbitrary and unreasonable."

But this is a long way from saying that the carrier could abandon all service and arbitrarily refuse to serve the public over a railroad it owned and which had been devoted to the public service for over 16 years.

*Denver vs. Denver Union Water Co.*, 246 U. S., 195; 62 L. Ed., 649 (cited on page 9 of petitioner's brief) :

This case does not touch the issue. The controversy was over an ordinance of the city of Denver fixing rates to be charged by the water company. It presents the usual and familiar questions which arise in cases involving statutory regulation of rates, and the claim of confiscation when the rates so fixed fail to yield a fair return upon the property devoted to public use.

*O. & M. Ry. Co. vs. People of Illinois*, 11 N. E., 347 (cited on page 8 of petitioner's brief) :

This was a case in which a mandamus was sought to compel the running of additional trains over part of a railroad on which it was claimed that the railroad had never paid expenses.

It is nowhere stated in the opinion that the road may be abandoned against the will of the State, nor do the facts as stated in the opinion fit the case we now present. The facts here presented are wholly different.

*State of South Carolina vs. Jack*, 145 Fed., 286 (cited on page 6 of petitioner's brief) :

This case is cited by petitioner in support of its theory that it may abandon its road at its pleasure. In the excerpt from the opinion found on page 6 of petitioner's brief, the case of *Northern Pacific R. Co. vs. Dustin*, prosecutor of the Territory of Washington, is cited (142 U. S., 492; 35 L. Ed., 1092).

In the elaborate opinion of the Supreme Court of the United States written by Mr. Justice Gray, among a number of decisions cited in which the obligation to reasonably serve the public was discussed, the case of *Com. vs. Eastern Railroad Co.*, 103 Mass., 254, 258, was used to illustrate the enforceable duty of operating a railroad, and in that opinion it is said (speaking of the directors of a corporation having a permissive charter) :

"And, on the same ground, if they refuse to provide reasonable accommodations for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine, and their determination on this point must be conclusive."

*The Adamson Case, Wilson vs. New*, 243 U. S., 335; 61 L. Ed., 755, 773 (cited on page 4, petitioner's brief) :

While this case is cited by petitioner, the opinion written by Mr. Justice Van Devanter does not appear to be at variance with our contention, in so far as the duty to operate a common carrier is concerned or may be compelled.

On page 347 of the opinion it is said:

"That the business of common carrier by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by many decisions, state and Federal, and is illustrated by such a continuous exertion of state and Federal legislative power, as to leave no room for question on the subject."

And in the whole jurisprudence there is no clearer statement on the subject than the following expression found in *The Adamson Case*:

"Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no obligation which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty."

*Tap Line Case.*

*A Common Carrier by Test of Law.*

The railroad system of the South and Southwest owes its origin, in a large measure, to the lumber industry, which found it necessary to build railroads, in connection with saw mills, in order to transport logs and lumber.

The development of common carrier railroads from logging or lumber roads has received consideration by the Interstate Commerce Commission and by this Court, in *The Tap Line Case* 234 U. S., 1: 58 L. Ed., 1185.

The Interstate Commerce Commission, in the case of *Central Yellow Pine Association vs. Vicksburg, Shreveport & Pacific Ry. Co.*, 10 I. C. C., 193, 199, cited by this court in the *Tap Line Case*, said:

"While these logging roads are almost or quite without exception mill propositions at the outset, built

exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all of these lines even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight.

Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the State, who insist in this case that they are such, and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers—a circumstance to be noted in determining their true character. *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286; 57 L. Ed., 226; 33 Sup. Ct. Rep., 83. They are engaged in transportation as that term is defined in the commerce act and described in decisions of this court. *Coe v. Errol*, 116 U. S., 517; 29 L. Ed., 715; 6 Sup. Ct. Rep., 475; *Covington Stock Yards Co. vs. Keith*, 139 U. S., 128; 35 L. Ed. 73; 11 Sup. Ct. Rep., 461; *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S., 498; 55 L. Ed., 310; 31 Sup. Ct. Rep., 279; *United States v. Union Stock Yard & Transit Co.*, *supra*.

Applying the principles which we have stated as determinative of the character of these roads, and without repeating the facts concerning them, they would seem to fill all the requirements of common

carriers so employed, unless the grounds upon which they were determined not to be such by the commission are adequate to that end."

*U. S. v. La. & P. R. Co.*, 234 U. S., 26; 58 L. Ed., 1195.

*Cedar Rapids Gas Light Co. vs. Cedar Rapids*, 223 U. S. 655; 56 L. Ed., 594 (cited on page 30 of petitioner's second supplemental brief).

This was a case in which the district court of Lynn County, State of Iowa, dismissed a bill restraining the enforcement of an ordinance fixing 90 cents per cubic foot as a maximum charge for gas, without prejudice to a later suit after the ordinance could be given a fair test. The decree was affirmed.

This was a rate case, and we do not see that it has any bearing upon the issues presented in the case under review.

*Kansas City Southern Railway Co. vs. Alberts Commission Company*, 223 U. S., 573; 56 L. Ed., 556.

This was a case in which the Supreme Court reversed a judgment of the Supreme Court of Kansas, which affirmed a judgment of the district court of Crawford County in that State, holding the carrier liable as garnishee to a creditor of a shipper.

There is nothing in the opinion which has even the remotest bearing on the issues here involved, except upon the question of the findings of fact by the State court not being subject to review.

*Creswill vs. Grand Lodge*, K. P., 225 U. S. 246; 56 L. Ed., 1074.

This was a writ of error to the Supreme Court of the State of Georgia, to review a decree which, on second appeal, affirmed a decree of the Superior Court of Fulton County in that State, enjoining the infringement of the name of a fra-

ternal order and the copy of its insignia and emblems. The case was reversed and remanded for further procedure.

The bearing of that case upon the one at bar is that it refers to the well-established rule that on writ of error to a state court the Supreme Court will not review findings of fact, and points out exceptions to the general rule. These exceptions are when there was no evidence to support the findings, or when the evidence was so meagre as not to justify the court in its findings.

In the case at bar the voluminous transcript, containing the evidence before the commission upon which the order was issued, reviewed and upheld, precludes any doubt of its sufficiency.

*Washington ex rel. Oregon R. & N. Co. vs. Fairchild*, 224 U. S., 510; 56 L. Ed., 863. (Cited on page 31, second supplemental brief.)

In this case it is held that whether or not, as a matter of law, the facts proven show the existence of such a public necessity for trackage connections between competing railway companies for the interchange of business as authorizes a taking of property, is a question for consideration in the Federal Supreme Court on writ of error to a State Court in a case in which an order of a State railway commission requiring such connection is attacked as denying due process of law.

"The case cited required the Oregon Railway & Navigation Company to make track connections between competing railway companies at certain points for the interchange of business."

It was held that no public necessity was shown for the building of the said connections. When the case was tried under the law of Washington "The company was not permitted to offer additional testimony for the purpose of establishing its defense since the statute of that state declared that

the validity of the order was to be determined by the Court on what had been proven before the commission."

The burden was not on the commission to establish the allegations of the company. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the commission could not, under this statute, be supplied on judicial review by a presumption arising from the failure of the carriers to disprove what had not been established.

How different this is from the Louisiana procedure will readily be seen by a reference to the statute providing for the trial of cases contesting orders of the commission found on pages 5 and 6 of the brief for the commission.

*Norfolk & Western Railway Co. vs. Conley*, 236 U. S. 609; 59 L. Ed., 745.

(Cited on page 30 of petitioner's second supplemental brief.)

This was the West Virginia Two-Cent-Passenger-Fare Case. As stated by Mr. Justice Hughes, the fundamental question presented was whether the validity of a passenger rate can be determined by its effect upon the passenger business of the company separately considered.

This was also a rate case, and did not involve the operation of a common carrier under an assumed public duty. It is in the same category of all other rate cases which have been clearly distinguished in repeated decision of the court from cases of this character, in which the State is seeking to compel the performance of a public duty assumed by the owner of the property,

*Southern Pacific Company vs. Schuyler*, 227 U. S., 601; 57 L. Ed., 662.



(Cited on page 31 of petitioner's second supplemental brief.)

This was a case to review a judgment recovered against the plaintiff in error for damages on account of the death of one Charles A. Schuyler, occasioned by the derailment of a mail train at Gertney, Utah, January 14, 1907, while the deceased was riding thereon.

This is cited by the petitioner without a reference to the particular part of the case which applies here, and after reading it thoroughly, we are unable to find that it has any application.

*Wood vs. Cheeseborough*, 228 U. S., 672; 57 L. Ed., 1918.

(Cited on page 31 of petitioner's second supplemental brief.)

This was a writ of error to the Supreme Court of Mississippi to review a decree which affirmed a decree of the Chancery Court of Marion County in that State, dismissing a suit to quiet title.

The case was dismissed for want of jurisdiction. The decision contains the following language:

"The Supreme Court in the case at bar accepted this decision (*Brooks vs. Spann*, 63 Miss., 198) as determining the law of the State, and we cannot review its judgment and give a different interpretation of that law."

### CONCLUSION.

The development of the railroad system has been closely interwoven with the lumber business. Many important trunk lines were once logging roads. There is every opportunity for developing profitable traffic along the railroad involved in this case. The country is not a "primeval forest" or a "barren

waste." When the management notifies the public it is not going to haul traffic any longer, after doing so for 16 years or more, there is of course, demoralization. With a management operating the railroad with the idea of developing traffic it will become again profitable to its owners as it has always been in the past.

The case is respectfully submitted.

A. V. COCO,

*Attorney General of Louisiana.*

W. M. BARROW,

*Assistant Attorney General,*

*Solicitors for R. R. Commission of Louisiana, Respondent.*

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**No. 386**

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**SUPREME COURT OF THE UNITED STATES**

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**OCTOBER TERM, 1918.**

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**BROOKS-SCANLON COMPANY,**  
**Petitioner,**  
*versus*

**RAILROAD COMMISSION OF LOUISIANA.**  
**Respondent.**

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**On Certiorari to the Supreme Court of the State of  
Louisiana.**

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**Second Supplemental Brief on Behalf of Brooks-Scanlon  
Company, Petitioner.**

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**SYLLABUS.**

1. The Brooks-Scanlon Company, the company which has been ordered to operate this railroad, has never operated it heretofore.
2. Due application to discontinue this railroad was made to the Louisiana Railroad Commission, as appears from absolutely uncontradicted evidence.
3. Due resistance of a rule to show cause why it should

not operate this railroad was made before the Louisiana Railroad Commission, as appears from absolutely uncontradicted evidence.

4. The Assistant Attorney General himself advised the Railroad Commission that it could not compel the Brooks-Scanlon Company to operate this railroad.
5. This railroad cannot be operated except at a loss. The railroad corporation which has been operating it has been allowed to give up its franchise and to discontinue operations. To compel a non-railroad corporation to operate it at a loss simply because it happened to own the right of way, rails, ties, etc., not including the rolling stock, is to deprive that corporation of its constitutional rights.
6. The Supreme Court of Louisiana has made no finding of fact which would preclude this Court from doing justice in this case.
7. This case was decided below upon the ground that the State could compel the Brooks-Scanlon Company to operate this road at a loss for public convenience. The case did not and could not have gone off upon a non-Federal question.

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*If the Court Please:*

Because of the size of the record, it has seemed to us that it might facilitate the Court should we give a concise chronological statement of facts. That statement is as follows:

I.

(1) Aug. 16, 1895. Banner Lumber Co., Ltd.,

a large saw mill, was incorporated. (Charter, p. 257.)

(2) 1900 to 1903 (about). Banner Lumber Co., Ltd. built and operated, without incorporating, the Kentwood & Eastern Railroad as an adjunct to its mill.

(3) Brooks-Scanlon **Lumber** Company incorporated. ( Extract from Charter Supplemental Transcript, p. —.)

(4) Nov. 1, 1905. Banner Lumber Co., Ltd., sold its mill, its timber and the Kentwood & Eastern Railroad to Brooks-Scanlon **Lumber** Company (p. 70.)

(5) Dec. 5, 1905. Kentwood & Eastern Railway Co., incorporated. (Charter, p. 260.)

(6) Kentwood & Eastern Railway Company at once assumed operation of railroad from November 1, 1905. (Keyes' testimony, p. 178 *et seq.*)

(7) Dec. 5, 1905. Verbal lease by Brooks-Scanlon **Lumber** Company of railroad and equipment to Kentwood & Eastern Railway Company, same to have retroactive effect and begin as of Nov. 1, 1905. (Keyes', pp. 186, 187.)

(8) Feb. 17, 1906. Brooks-Scanlon Co. incorporated. (Charter, p. 271.)

(9) February, 1906. Brooks-Scanlon Lumber Co. sold mill, timber and physical property of railroad to Brooks Scanlon Company (p. 71).

(10) February, 1906. The Brooks-Scanlon Company continued verbal lease of the railroad to K. & E. Railway Company. (Keyes, pp. 186, 187.)

(11) July 1, 1906. The Brooks-Scanlon Com-

pany reduced to writing the verbal lease of the K. & E. Railway Company. (Keyes, pp. 186, 187; Lease, p. 247.)

(12) July 1, 1906. Brooks-Scanlon Co. sold all the rolling stock to the K. & E. Railway Company (p. 251).

## II.

**Note: The Brooks-Scanlon Company, petitioner herein, never at any time itself operated the Kentwood & Eastern Railroad.**

### **PROCEEDINGS BEFORE RAILROAD COMMISSION.**

(1) Jan. 22, 1918. Judge R. R. Reid, attorney for Brooks-Scanlon Company and for Kentwood & Eastern Railway Company, appeared at a regular meeting of the Railroad Commission of Louisiana and the following colloquy occurred as shown by the stenographer's report (R., p. 232):

#### **Reid's Statement:**

**"Gentlemen of the Commission,** the Kentwood & Eastern Railway Company has been operating east from Kentwood, about twenty-nine miles, by narrow-gauge railroad, to Hackley, Louisiana. This railroad was originally built by the Banner Lumber Company, or saw mill company, which was incorporated under the laws of the State of Louisiana. On the first day of November, 1905, the Banner Lumber Company sold its timber holdings on the line of this railroad to the Brooks-Scanlon Lumber Co., which is a Minnesota corporation, domiciled in Minneapolis. Subsequently this company, being practically forbidden by the terms of its charter



to operate a railroad, leased the property to a new Louisiana corporation, known as the Kentwood & Eastern Railroad Company, for a term of twenty years, subject to the right of the lessee or the lessor to terminate the lease at any time upon six months' notice. The Kentwood & Eastern Railroad Company, in the meantime, had built a standard-gauge road, which parallels the narrow-gauge road for several miles, and then turns in a southeasterly direction, now operating over some other leased track to Madisonville, I believe, the head of navigation on the Tchefuncta River. On October 22, 1917, the Brooks-Scanlon Company served notice on the Kentwood & Eastern Railroad Company of their intention to avail themselves of the stipulation in the lease to cancel it on six months' notice; so that on the twenty-second day of April our lease will, by its terms, be cancelled. Well, we thought it best to come before the Commission and lay this matter before you, and I expect to ask the advice of the Commission, to some extent, in the matter. Of course, if the owner of the property terminates the lease under its terms, the lessor is powerless to hold the property, so we thought it best to come down here and discuss the matter informally with you. Personally, I don't see how we can operate after the twenty-first day of April, our lease expiring by its terms and conditions on that date. Now, we don't want to get into any antagonistic or hostile relations with the Commission, and I would like to know what notice the Commission will require from the railroad, if any, beyond the mere notification to the Commission that we will cease operations on that date.

**Commissioner Michel:** Does the lease cover the road bed and equipment and everything?

**Mr. Reid:** No, sir, it only covers the road bed. The equipment belongs to the Kentwood & Eastern Railroad, while the road bed and rails and ties belong to the Brooks-Scanlon Company, the Kentwood & Eastern Railroad Company operating the property simply as lessee. As I have said, we are somewhat in the dark as to just what procedure is necessary, and it is for that purpose that we have come here,—to discuss with the Commission, in order that we may comply with whatever they may require in the way of notice.

**Chairman Taylor:** Why don't you buy the railroad?

**Mr. Reid:** Because we haven't got the money, and it would be a very unprofitable investment even if we were in shape to do it, and we couldn't afford anyway, to continue operating it. Our records will show that we have been losing about \$1,000 a month for the last four months in the expense of maintaining and operating the road, over and above the earnings of the railroad, exclusive of the lease. Of course, I understand that you gentlemen may not single out one railroad from another, but the fact is that the Kentwood & Eastern never was a practical or profitable railroad, except because it was hauling a very large amount of timber for the Brooks-Scanlon Company, and the Brooks-Scanlon Company, as a business proposition, never would have leased the railroad to the Kentwood & Eastern Railroad if it had not been compelled to get somebody else to haul the logs. Now that the Brooks-Scanlon company has cut out all of its timber in that country, it has no interest in the railroad operating any longer, and as a business proposition, of course, nobody else wants it."

(2) Jan. 25, 1918. Henry Jastremski, Secretary of the Railroad Commission of Louisiana, wrote to Judge Reid, attorney, as follows (R., p. 234) :

"January 25, 1918.

"Hon. R. R. Reid,  
Amite, Louisiana.

Dear Judge:

Relative to your statement concerning the discontinuance of the Kentwood & Eastern Railroad, I beg to advise that the matter was considered by the Commission, and I was instructed to say to you that under the circumstances **it will only be necessary for you to file formal notice** of the proposed discontinuance, in writing, with the Commission. Notice should also at once be given the public. Further than this there are no requirements by the Commission.

Yours very truly,

(Signed) HENRY JASTREMSKI,  
Secretary."

(3) Jan. 29, 1918. Kentwood & Eastern Railway Company filed formal notice of intention to discontinue (p. 234).

(4) Jan. 30, 1918. Henry Jastremski, Secretary, wrote George A. Keyes, General Manager, as follows (R., p. 235) :

"Mr. George A. Keyes, General Manager,  
The Kentwood & Eastern Railway Company,  
Kentwood, Louisiana.

Dear Sir:

This is to acknowledge receipt of your letter of 29th instant, advising that on April 22, 1918, the

Kentwood & Eastern Railway Company will cease to operate the narrow-gauge portion of its line from Kentwood to Hackley, Louisiana, on account of the fact that the owners of the railway property have decided to terminate the lease under which this line is now being operated.

Your letter has been properly filed.

Yours very truly,

(Signed) HENRY JASTREMSKI.

Secretary."

(5) Feb. 4, 1918. George A. Keyes, General Manager, wrote Henry Jastremski, Secretary, as follows (R., p. 235):

"Mr. Henry Jastremski, Secretary,  
Railroad Commission of Louisiana,  
Baton Rouge, Louisiana.

Dear Sir:

Referring to our notice of the 29th with reference to discontinuance of operation of the narrow-gauge line between Kentwood and Hackley, which you acknowledge under date of January 30, your file T-188. Under the circumstances I presume it will be unnecessary to us to secure authority from the Commission to cancel out all rates to and from points on that line. If my understanding is incorrect as to this, however, I would ask that you consider this as an application for authority to cancel out all local and joint intrastate rates, effective April 22, 1918.

Yours truly,

(Signed) GEO. A. KEYES,  
General Manager."

(6) Feb. 20, 1918. George A. Keyes, General Manager, wrote Henry Jastremski, Secretary, as follows (R., p. 236):

"Mr. Henry Jastremski, Secretary,  
Railroad Commission of Louisiana,  
Baton Rouge, Louisiana.

Dear Sir:

Referring to my letter to you of February 4, and your reply under date of the fifth with reference to the matter of cancelling out our local and joint intrastate rates between Kentwood and Hackley, account of discontinuing the operation of that line on April 21, would state that some of our joint tariffs contain both intrastate and interstate rates, and it is our desire to cancel them all at the same time. In order to do this it is necessary that we take prompt action in the matter, consequently we will greatly appreciate as early advice as possible in reply to my letter of February 4.

(Signed) GEO. A. KEYES,  
General Manager."

(7) Feb. 21, 1918. Henry Jastremski, Secretary, wrote George A. Keyes, General Manager, as follows (R., p. 237):

February 21, 1918.

Mr. George A. Keyes, General Manager,  
Kentwood & Eastern Railway Company,  
Kentwood, La.

Dear Sir:

Referring to your letter of February 20 (file 218) I am enclosing herewith Authority No. 10906-R, covering the cancellation of local and joint intrastate rates to and from points on the Kentwood &

Eastern Railway between Kentwood, Louisiana, and Hackley, Louisiana.

Yours very truly,  
(Signed) HENRY JASTREMSKI,  
Secretary."

The enclosure referred to read as follows:

"Baton Rouge, February 21, 1918.

**AUTHORITY NO. 10906-R**

**Classes and Commodities Between Points on Kentwood & Eastern Railway Company.**

Upon application of the Kentwood & Eastern Railway Company, dated February 4, 1918 (file 218), on account of the discontinuance of the line of railway between Kentwood and Hackley, Louisiana, authority is hereby granted for the cancellation of all local and joint intrastate rates to and from points on the Kentwood & Eastern Railway between Kentwood, Louisiana, and Hackley, Louisiana, effective April 22, 1918.

**By order of the Commission.**

(Signed) HENRY JASTREMSKI,  
Secretary."

(8) Jan. 29. 1918. Prompt notice of the discontinuance of operations was given. (See copy of notice, p. 246.)

(9) Feb. 8, 1918. W. M. Barrow, attorney for Railroad Commission of Louisiana, advised that body that it had no authority to compel Brooks-Scanlon Company to operate the road. That letter reads as follows (R., p. 243):

"Baton Rouge, Louisiana, Feb. 8, 1918.

"Hon. Shelby Taylor, Chairman

"Railroad Commission of Louisiana,

"Baton Rouge, La.

"Dear Sir:—

"In reply to yours of February 5, 1918, request-

ing that I give you an opinion as to power and authority of the Railroad Commission of Louisiana to prevent the discontinuance of service over the narrow gauge railroad operated by the Kentwood & Eastern Railroad Company, running from Kentwood to Hackley, and specially as to the rights of the patrons of the road to oppose the discontinuance of the railroad, I give you my opinion as follows:

# I.

## **"Power and Authority of the Railroad Commission of Louisiana to Prevent the Discontinuance of Service Over a Portion of Its Track Operated Under Lease.**

"As you well know, the powers of the Railroad Commission are set forth in Articles 284 and 286 of the Constitution of Louisiana.

"Article 284 gives the Commission power and authority, and makes it its duty, to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad freight and passenger tariffs and service; to correct abuses, etc.

"Art. 286 extends the power and authority of the Commission so as to affect and include all matters and things connected with and concerning the service to be given by railroad companies and corporations in the State. and their operations within the State.

"It is a matter not debatable that the State, subject to certain limitations, has, in furtherance of its object of advancing the public good, a power of regulation and control over the actions and conduct of those to whom she has granted these rights and franchises."

*"M. L. & T. R. R. & S. S. Co. et al. v. Railroad Commission, 109 La. 247.*

"In the same case the Court holds that the Commission 'is an administrative board, created by the State for carrying into effect the will of the State as expressed by its legislation.'

"In *Railroad Commission v. Kansas City Southern Railway Co.*, 111 La. 487, the Supreme Court says:

" 'The word "regulate" has a broad meaning. We think it includes the power to see to the maintenance of the main track and all its switches and spurs, as the time of taking charge, and power to prevent any change when reasonably in public interest, a change should be made.' \* \* \*

" 'The power to regulate carries with it full power over the thing subject to regulation. Here the Constitution has placed the railroad and its appurtenances under the authority of the Commission.' \* \* \*

" 'It follows the thing to be regulated includes main line and side track already laid.'

"Under its general powers—broad in the extreme—the Commission has full authority over the railroads in the State of Louisiana, and may prevent the removal or abandonment of any part of a main line or its appurtenances used in serving the public.

"So that, if the Kentwood & Eastern Railroad Company owned the 29 miles of narrow gauge track between Kentwood and Hackley, which it now seeks to abandon, there would be no question of the authority of the Commission to prevent its removal or the discontinuance of its operation, except upon dissolution of the railway corporation, in accordance with the laws of the State.

"The Kentwood & Eastern Railroad Company,



however, does not own the track between Kentwood and Hackley, according to the information which you have furnished me. The track sought to be abandoned belongs to the Brooks-Scanlon Lumber Company, from whom it is leased by the Kentwood and Eastern Railroad Company, for a term of twenty years, subject to the right of the lessee or lessor to terminate the lease at any time upon six months' notice. The Brooks-Scanlon Lumber Company has served notice on the Kentwood & Eastern Railroad Company of its intention to avail itself of the stipulation in the lease and cancel the contract for the use of the track on six months' notice, which term will expire on the 22nd day of April, 1918.

"As the Railroad Commission cannot compel two companies to enter into a lease, it is plain that the Commission cannot compel the extension of a lease beyond the date of its termination, either by expiration or on notice from one party to the other, under its terms. As the Kentwood & Eastern Railroad Company will have no rights on the railroad belonging to the Brooks-Scanlon Lumber Company after the lease is terminated, it cannot be compelled by the Railroad Commission to give service beyond that date.

"If the Brooks-Scanlon Lumber Company was chartered as a railroad company, or had undertaken to perform the services as a common carrier, it could be required to give the service over its railroad after the expiration of the lease to the Kentwood & Eastern. But from the information you have furnished me, it appears that the Brooks-Scanlon Lumber Company is not only not permitted under its charter to perform a railroad service, but is expressly prohibited under its charter from operating a railroad.

"There appears, therefore, to be no relief which the Commission can give the unfortunate shippers who have depended on this transient railway for transportation.

## II.

### **Right of Patrons of Kentwood & Eastern Railroad Company to Oppose the Discontinuance of the Railroad.**

Patrons of the Kentwood & Eastern Railroad have the undoubted right to protest against the discontinuance of any part of the railroad, but for reasons which I have carefully explained, there is no relief which the Commission can give them in this instance.

Respectfully submitted,

(Signed)

W. M. BARROW,  
Assistant Attorney General.

(10) April 10, 1918. Henry Jastremski, Secretary, wrote Brooks-Scanlon Lumber Company (p. 238) as follows:

"April 10, 1918.

"Mr. J. S. Foley, General Manager,

"The Brooks-Scanlon Lumber Company,

"Kentwood, La.

"Dear Sir:

"The Railroad Commission of Louisiana has been notified by the Kentwood & Eastern Railroad Company that, effective April 22, 1918, it will discontinue operating the narrow-gauge railroad leased from your company, between Bolivar Junction and Hackley, Louisiana.

"Records in our possession show that the Brooks-Scanlon Lumber Company acquired the Kentwood & Eastern Railroad from the Banner Lumber Com-

pany as a going concern and operated a narrow-gauge railroad during the period from the first day of November, 1905, until December 5, 1905, or about that date.

"This line has always been operated as a common carrier, and was one of the railroads claiming exemption from taxation for a portion of its lines, and was claiming before the Interstate Commerce Commission in the Tap Line Case to be a common carrier.

"The Commission desires information as early as possible as to what arrangements your company has made to continue the operation of the Kentwood & Eastern Railroad as a common carrier.

"Please advise as soon as possible.

"Yours very truly,

(Signed)

"HENRY JASTREMSKI,

"Secretary."

(11) April 17, 1918. Brooks-Scanlon Company wrote Henry Jastremski, Secretary:

"Kentwood, La., April 17, 1918.

"Railroad Commission of Louisiana,

"Baton Rouge, La.

"Gentlemen:

"Your letter of the 10th (file T-188). This company has never at any time operated the narrow-gauge railroad between Kentwood and Hackley, known as the Kentwood & Eastern Railroad. No doubt the operating company, the Kentwood & Eastern Railway Company, has claimed exemption from taxation, in accordance with the law, etc.

"This company is not making any preparation for operating this railroad. We are incorporated

under the laws of the State of Minnesota, and our charter does not give us this privilege.

"Yours truly,

"BROOKS-SCANLON COMPANY,

"By J. S. FOLEY."

(12) June 4, 1918. Railroad Commission of Louisiana issued the following citation to Brooks-Scanlon Company and Kentwood & Eastern Railway Company (Supplemental Record, p. —):

"RAILROAD COMMISSION OF LOUISIANA

"To the Kentwood & Eastern Railway Company,  
Through George A. Keyes, General Manager,  
and to the **Brooks-Scanlon Company**.

"Greeting:

No. 2778.

"You are hereby commanded and required to appear before the Railroad Commission of Louisiana, in its office in the capital at Baton Rouge, La., at such time as may hereafter be fixed, and then and there **TO SHOW CAUSE**, if any there be, why you and each of you should not be required to forfeit and pay to the Treasurer of the State of Louisiana the sum of not less than \$100.00 nor more than \$500.00 for continuing the operation of the narrow-gauge railroad of the **Kentwood & Eastern Railway Company**, between Hackley, Louisiana, and Kentwood, Louisiana, in violation of the rules and regulations of the Railroad Commission of Louisiana; and to further show cause, if any there be, why **freight and passenger service should not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or the Brooks-Scanlon Company, or their successors,**

agents or assigns, in accordance with appropriate orders to be handed down and entered by the Railroad Commission of Louisiana, after a full and complete investigation; and for such other or further interlocutory or final orders as may appear to the Commission to be necessary to protect the interests of the public.

"By Order of the Commission,  
"Baton Rouge, La., June 4, 1918.

"HENRY JASTREMSKI,  
"Secretary."

(Black letters by present writer.) (See R., pp. 175-176 for construction of this order by Chairman of Louisiana Railroad Commission.)

(12) June 17, 1918. Formal order of Railroad Commission setting rule to show cause for trial. (Supplemental Record, p. —.)

(14) June 25, 1918; June 26, 1918. Consumed by the Railroad Commission of Louisiana in a formal hearing of the rule to show cause why the Brooks-Scanlon Company and the Kentwood & Eastern Railway Company should not operate the property, all parties being represented by counsel. (R., pp. 90 and 91.)

### III.

#### OPERATION OF ROAD NECESSARILY AT A LOSS.

Between pages 256 and 257 of the record is to be found a detailed itemized statement of the operating revenues and operating expenses of the Kentwood & Eastern Railway Company for the entire year 1917, and for the months of January, February, March, April and May, 1918. This tabulation shows that the gross cost of operation exceeded

the gross revenues from operation by the following amounts:

Whole Year,	Jan.,	Feb.,	March,	April,	May,
1917.	1918.	1918.	1918.	1918.	1918.
\$16,261.72	\$1,569.81	\$1,199.09	\$401.19	\$2,183.87	\$2,914.28

Counsel for the Railroad Commission attacks these figures on two grounds:

(1) He contends that these figures include as part of the operating expenses a rental paid by the Kentwood & Eastern Railway Company to the Brooks-Scanlon Company of \$833.33 a month, or \$10,000.00 per year, and he contends that as the Brooks-Scanlon Company would not have to pay a rental, this charge should be eliminated. It is true that the owner of the property would not have to pay a rental on it, but the owner would be entitled to a fair return on his investment, and such a fair return would certainly exceed \$10,000.00 per annum. The record (pp. 201, 202) shows conclusively that the actual value of the steel alone in the tracks of the railroad aggregated not less than \$100,000.00. It shows, on page 172, that there are 100,000 ties in the tracks valued very conservatively at forty cents each, or \$40,000.00, and it shows that the selling price of the rolling stock amounted to \$37,500.00. This does not include anything as the value of the right of way or the bridges or the buildings, or the numerous other accessories to the railroad. The only evidence in the record as to the value of the entire property was that of Mr. Keyes, who, on page 176, estimated its value at \$10,000.00 per mile, or \$298,200.00 for 29.82 miles. We think, therefore,

that we are very conservative in taking the value of the property for the purposes of this argument at \$190,000.00. Seven per cent. on \$190,000.00 is \$13,300.00. If, therefore, you deducted the \$10,000.00 rental, fairness would require you to include at least \$13,300.00 in order to give the Brooks-Scanlon Company a fair return on its investment. However, the earnings are so poor that even if the owner is not allowed any return whatever on his investment, the gross operating expenses will exceed the gross revenues. This statement is proven by a glance at the above tabulation and is arrived at by deducting \$10,000.00 from the figures for the whole year 1917 and \$833.33 from each of the months of 1918.

(2) The Railroad Commission counsel contends that the order of the Louisiana Railroad Commission authorized the Railway to increase its rates twenty-five per cent., and that this increase would permit it to collect a gross revenue in excess of gross operating expenses. No evidence whatever was offered by him in support of this contention, and the evidence in the record conclusively refutes it. Mr. Keyes, the general manager of the corporation, testified very frankly that after the Kentwood & Eastern Railway Company received from the Brooks-Scanlon Company, in December, 1917, the notice that the lease of the railroad would be terminated on April 21, 1918, he reduced his maintenance expenditures to the minimum consistent with safety. (R., pp. 193, 171.) This is borne out by the tabulation at page 256. By taking the average monthly maintenance of way for the months of 1917, it will be found that that average amounted during that year to \$1,712.39 per

month. In order to maintain the road at the same standard in the year 1918, it would, therefore, be necessary to expend considerably in excess of \$1,712.39 per month, because the cost of labor and the cost of materials in 1918 was materially greater than in 1917. If, however, we disregard this and use only the figures \$1,712.39 per month, and apply it to the maintenance of way in the year 1918, we find that the amounts expended in 1918 were less than the average by the following amounts for the following months:

January, 1918 .....	\$ 610.57
February, 1918 .....	373.99
March, 1918 .....	1,010.65
April, 1918 .....	730.79
May, 1918 .....	977.27

If, now, we disregard the fact that the bulk of the business of the road moves interstate (T. p. 212), and is therefore not affected by the suggestion of the Louisiana Commission that the intrastate rates be increased 25%, and if we increase the entire freight and passenger revenue for these five months by 25%, and if we deduct from the operating expenses the entire rental charges, thereby leaving the owner absolutely no return upon his investment, we find that the figures are as follows:

<b>January, 1918:</b>	
Rental charge deducted .....	\$ 833.33
25% of freight added .....	646.67
25% of passengers added.....	55.23
<b>Total deduction from deficit .....</b>	<b>\$1,535.23</b>



Deficit as shown by tabulation.....	\$1,569.81
Add deferred maintenance .....	610.57
<hr/>	
Total deficit for the month.....	\$2,180.38
Total suggested deductions from deficit.....	1,535.23
<hr/>	
<b>Net deficit .....</b>	<b>\$ 645.15</b>

Not allowing one single penny as a fair return to the owners upon their investment, and conceding *arguendo* that a 25 per cent increase in rates would produce a 25 per cent increase in revenues, although we show *supra* that such will not be the case. The same calculation can be readily made for each of the other months of the year 1918, which is given. Unless our mathematics are at fault, the figures are as follows:

Net deficit—February .....	\$ 490.20
Net profit—March .....	466.53
Net deficit—April .....	1,317.29
Net deficit—May .....	2,801.08
Net deficit for the 5 months.....	4,787.27

This calculation conclusively demonstrates the fact that in not one single one of these months would the gross income from the road have equalled the operating expenses, exclusive of any return on the property, with the exception of March, in which month the gross income exceeded the operating expenses by a very narrow margin. The reason that the income in March did thus exceed the operating expenses was stated by Mr. Keyes, on page 175 of his testimony, to be due in part at least to the fact that some of the persons living on the line, realizing that the railroad would be dis-

continued in the Month of April, increased their shipments in order to clean up.

The tabulation given above seems absolutely conclusive. It shows to a mathematical certainty that even if all the theoretical contentions of the defendant regarding revenue from increased rates be conceded, there would still be an excess of operating expenses over gross revenue, no allowance being made for a fair return on the property. The evidence thus strikingly given by the tabulation is supplemented by the following statement from the General Manager of the road (T., p. 215):

**"Mr. Reid:** From the records and data you have and your knowledge of the conditions along that line, can you operate one train each way per day on the narrow-gauge line and pay your expenses?

**Mr. Keyes:** I believe it could be made to pay if we could operate a train with a full tonnage.

**Mr. Reid:** I am speaking of the operation of a train under the conditions that exist out in that country now, with the tonnage to haul that your experience in the last year or so leads you to believe that there is out there to haul.

**Mr. Keyes:** JUDGE, YOU CANNOT—IF YOU HAD TO OPERATE THAT ROAD WITH THE BUSINESS THERE IS OUT THERE, YOU COULD NOT MAKE IT PAY ENOUGH TO PAY FOR THE CROSSTIES AND BRIDGE TIMBERS, TO THE BEST OF MY INFORMATION AND BELIEF."

Keyes also swore (p. 214):

**Mr. Barrow:** Now, how much would you have

had to increase your earnings on this traffic other than logs and lumber or outside of logs in order to cover your deficit for those months? Take the month of October. What percentage of increase would it take in your earnings to stop that deficit?

**Mr. Keyes:** Nearly fifty per cent in October, nearly one hundred per cent in November, and about seventy per cent in December.

**Mr. Barrow:** Mr. Keyes, do you know what would be the effect of increasing your rates over there for transportation from Mount Herman and Hackley and places beyond?

**Mr. Keyes:** **THE BUSINESS WOULD MOVE BY OTHER METHODS**, and that is demonstrated to a certain degree by the fact that Mr. C. A. Sanders hauled all of his lumber during the month of May by truck, when he could have hauled it by rail; and I also understand that a truck service has been established between Franklinton and Hackley. We handled but very little business in there in the month of May. I also understand that a proposition has been made to the people at Mount Herman, the mercantile establishments, etc., by a wholesaler there to sell and deliver their goods to their doors or places of business as cheap as they have been buying it and receiving it by rail at our depot.

**Mr. Reid:** Then, in other words, from your knowledge of the people out there and the business that is there, could you fairly expect any increase in your revenues by increasing your rates?

**Mr. Keyes:** Possibly if there was but a very small increase, we would continue to get what business

there is left, but it would have to be a very small increase.

**Mr. Reid:** Now, take the months of January, February, March and April. I understand you to say that you hauled but very little logs during that time. Now, will your tariff on lumber stand any increase in view of the location of the mills and the competition you have out there?

**Mr. Keyes:** It might stand a small increase.

**Mr. Reid:** BUT WOULD IT STAND AN INCREASE ANYTHING LIKE THAT WHICH WOULD BE NECESSARY TO BRING YOUR EARNINGS TO THE POINT OF YOUR EXPENDITURES?

**Mr. Keyes:** NO, SIR; IT WOULD NOT.

Add to this the proven fact that one of the towns on this road, Warnerton, is on another railroad, and several others are within a few miles of others, and we can see what will happen if rates are increased 25 per cent.

There is in this record not one single line, not one single word of testimony or evidence of any kind, character or description to offset the conclusive proof thus made that this road cannot be operated except at a monthly loss. If there is one thing that has been mathematically demonstrated in this case, it is that.

The proof above adduced seemed conclusive, but to make assurance doubly sure, the railway, as an experiment, by agreement of counsel without prejudice, tried running trains on a bi-weekly schedule from July 1, 1916, to July 19, 1916, with the results shown by the following

affidavit and tabulation, which are not contradicted or disputed in any way:

State of Louisiana,  
Parish of Tangipahoa—ss.

Geo. A. Keyes, being duly sworn, deposes and says that he is General Manager of the Kentwood & Eastern Railway Company; that the accompanying statement showing gross income of \$391.51 and total expenses of \$1,836.24 is approximately correct and as near so as can be determined at this time; further declares that of the receipts shown for freight, the total accruing on business, both in and out, amounted to:

For Mt. Hermon .....	\$ 3.46
Sunny Hill—Merchandise .....	.50
Murdock—Merchandise .....	1.50
Morgan—Merchandise .....	.50
Sunny Hill—2 cars potatoes .....	90.49
Hackley—4 cars lumber, McLain & Bickham .....	181.99
Hackley—2 cars crossties—McLain & Bickham .....	63.11
Total .....	<hr/> \$ 341.55

That McLain & Bickham advised some ten days ago that their timber was exhausted, their mill shut down and their lumber has all been shipped.

Affiant further states that the charges for maintenance of way and structure show much less than the normal amount, as there was no expense for renewal of crossties, labor and material for bridges, etc.; that section labor was also reduced to a minimum and much less than is normally required if operations are to be continued.

Affiant further states the charge for maintenance

of equipment is also below normal and includes only the expense of light running repairs and depreciation.

(Signed) Geo. A. Keyes.

Sworn to and subscribed before me at Kentwood, Louisiana, this twentieth day of July, 1918.

(Signed) A. C. Stewart

(Seal.)

Notary Public.

Railroad Commission of Louisiana.

Received July 22, 1918.

(Stamp) .....Secretary.

## KENTWOOD & EASTERN RAILWAY COMPANY.

### Statement of Operations of the Kentwood & Eastern Railroad, Between Kentwood and Hackley, from July 1, to 19, 1918, Inclusive, Trains Operated Bi-weekly as Per Agreement.

#### Operating Revenues:

Freight—Logs .....	.....
Freight—Other .....	341.55
Passenger .....	40.51
Other .....	9.45

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Gross income .....\$ 391.51

#### Operating Expenses:

Maintenance of W. and S. ....	290.50
Maintenance of equipment .....	233.08
Traffic .....	47.52
Transportation .....	447.42
General .....	160.45

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Total .....\$1,178.97

## Other Expenses:

Taxes .....	146.55
Rentals .....	510.72

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Total expenses .....	1,836.24
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Net deficit .....	\$1,444.73
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### THIS COURT NOT PRECLUDED FROM GRANTING RELIEF.

In the brief of respondent in this Court, the intimation is thrown out that petitioner cannot secure from this tribunal the relief which it is seeking because precluded by findings of fact by the Supreme Court of Louisiana. The Supreme Court of Louisiana in its opinion, R. P. 56, says:

"Plaintiff offered testimony only as to the earnings of the railroad of one branch or department of its business. **This showed a loss**, but the test of whether plaintiffs property will be taken without compensation by compelling it to perform an assumed public duty, is the net results from the whole enterprise."

By whole enterprise, the Supreme Court of Louisiana meant a sawmill and lumber business. The Supreme Court of Louisiana then proceeded to compel the Brooks-Scanlon Company to operate the railroad referred to after thus conceding that that railroad would be operated at a loss. We contend that this action violated the constitutional rights of the Brooks-Scanlon Company and we are here seeking vindication of those rights. We confidently

submit that there is no finding of fact by the Louisiana Supreme Court which is not well within the rules repeatedly laid down by this Court in the following cases:

*225 U. S., 246, Creswell v. Grand Lodge, K. of P.* In this case, the Court, speaking through Chief Justice White, at page 261, said:

"While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless, two propositions are as well settled as the rule itself, as follows: (a) where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (a) that) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question as to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

*223 U. S., 573. K. C. S. R. R. Co. v. Albers Commission Co.,* where this Court, speaking through Mr. Justice Van Devanter, said, page 591:

"In *Stanley v. Schwalby*, 162 U. S., 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the



attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found that he had such knowledge. In this Court it was insisted, on the one hand, that the finding was conclusive, and on the other, that the evidence was insufficient as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this Court, although recognizing the general rule that finds upon pure questions of fact are not open to review, said (p. 278): 'But so far as the judgment of the State Court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this Court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this Court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State Court. And in *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1., a case arising under the Federal Safety Appliance Law, wherein the State Court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery, this Court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence, was at most an assumption of the risk, which was not a de-

fense under the Federal statute. Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact."

*Norfolk & Western Ry. v. Conely*, 236 U. S., 609, where this Court, speaking through Mr. Justice Hughes, said:

"It is necessary for us in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter."

223 U. S., 665, *Cedar Rapids Gas Co. v. Cedar Rapids* (p. 668), where this Court, speaking through Mr. Justice Holmes, said:

"But, of course, findings either at law or in equity may depend upon questions that are re-examinable here. The admissibility of evidence of its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this Court. Such questions properly saved must be answered, and, so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined. *Kansas City Southern Railway Company v. Albers Commission Co.*, decided February 26, 1912, ante, p. 573. For instance, in this case, the finding of the Court that it was not

prepared to say that a ninety-cent rate was confiscatory may perhaps be taken to have been made subject to the admission that the rate was too low to permit a discount for prompt payment, and if so opens the question of whether it was not confiscatory on that account, as a matter of law. The plaintiff presents a number of such objections to the decision of the Court below, although confused with arguments on pure matter of fact."

See also 224 U. S., 510, *Oregon R. R. & N. Co. v. Fairchild*; 227 U. S. 601; *S. P. R. R. Co. v. Schuyler*, and 278 U. S. 672, *Wood v. Chesborough*.

#### THE CASE WAS NOT DECIDED BELOW ON A NON-FEDERAL QUESTION.

On page 11 of respondent's brief in opposition to the allowance of the *certiorari* a general nebulous intimation is made that this case may have been decided by the Supreme Court of Louisiana on a non-Federal ground. A most convincing negation of this suggestion is to be found in the opinion of that Court at R. P. 56, where, after reviewing the case at length, that Court said:

"The only question left for determination is whether plaintiff can be compelled by the Railroad Commission to operate its railroad and thus discharge its assumed obligation to the public, when it is alleged that the operation thereof would entail a loss upon it."

The Court then proceeds to decide this "only question left

for determination" adversely to the plaintiff, after specifically finding that

"Plaintiff offered testimony only as to the earnings of the railroad, of one branch or department of its business. This showed a loss. But the test of whether plaintiff's property would be taken without compensation by compelling it to perform an assumed public duty is the net results from the whole enterprise."

Plaintiff is here contending that this decision of this question violates its constitutional rights. On page 8 of their original brief our opponents admit that this is a Federal question. It, however, is the one upon which the Supreme Court of Louisiana pitched its decision.

It is true that that Court continuing said:

"Again the order of the Commission orders plaintiff to submit a new schedule for transportation which **may** be operated at much less expense to it than the former schedule cost, and at a net profit for plaintiff."

This is not a finding of historical fact. It is not even a prophecy. It is a faint hope, a mild sop of condolence. That Court hopes that there may be a profit—not a fair profit, mind you. It could not even **hope** for that, the limit even of its hope was just a profit. As shown *supra* in this brief, there is in the record not even that much talked of scintilla of evidence to support this crippled hope. The uncontradicted evidence shows with deplorable and mathematical certainty that there will be **no profit**, there must be only loss, an excess of actual operating expenses over

operating revenue. See 252 Fed. 530, First Supplemental Brief, p. 6, to the effect that a railroad cannot be forced to run on hope.

It is also true that the Court, overlooking the fact that the Brooks-Scanlon Company had itself never operated the railroad, further said:

"Plaintiff has not petitioned the Railroad Commission to permit it to discontinue its business of railroading, and until it has done so and the Commission has acted, the Courts are without jurisdiction of the matter. *State v. Brooks-Scanlon Co.*, 143 La., 539, 78 So. 847. The Kentwood and Eastern Railway Company has made such a request, but it is not nominally a party to this suit."

As shown in our original brief, on page 23, this statement was evidently made through inadvertence, and we call attention to it lest this Court might be misled by it:

If the Court will refer to the order of the Railroad Commission of Louisiana, which is the subject of controversy herein, and which is attached hereto, it will find that that order itself begins:

"Proceeding on its own motion the Railroad Commission of Louisiana, on June 4, 1918, issued a notice to the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company \* \* \* to show cause why they each should not be required to forfeit and pay to the State the sum of not less than \$100.00 nor more than \$5,000.00 for discontinuing the operation of the narrow-gauge railroad of the Kentwood & Eastern Railway Company, between Hackley, Louisiana, and Kentwood, Louisi-

ana, and to further show cause why freight and passenger service should not be provided and operated over the said railroad by either the Kentwood & Eastern Railway Company or the Brooks-Scanlon Company, or their successors, agents or assigns.

"And the Court will further find that in paragraph 4 (d) of the answer filed in the Court by the Railroad Commission of Louisiana that Commission says:

"\* \* \* \* \* The Railroad Commission of Louisiana on its own motion proceeded against the Kentwood & Eastern Railway Company and the Brooks-Scanlon Company for violation of its orders by discontinuing the operation of its trains on the said Kentwood & Eastern Railway between Kentwood and Hackley, Louisiana, and also served on the two said companies notices to show cause why either or both of the said companies should not operate continuously the said narrow-gauge railroad between Kentwood and Hackley, Louisiana. The case before the Railroad Commission was regularly heard, documentary evidence and oral testimony introduced and the case was submitted, and after due consideration the Railroad Commission of Louisiana entered its Order No. 2228, herein contested, all of which facts are fully set forth in the transcript of the proceedings.'

From the foregoing it conclusively and affirmatively appears by documents over the signature of the Railroad Commission itself that the Brooks-Scanlon Company was a party to a proceeding, the purpose of which was to show cause why either it or the Kentwood & Eastern Railway Company should not operate the narrow-gauge track.

At page 278 *et seq.* of the transcript is to be found a copy of the answer filed before the Railroad Commission by the Brooks-Scanlon Company, wherein that company earnestly resisted the effort made by the Railroad Commission to compel it to operate the railroad. The record shows that on these pleadings, a complete litigated hearing was held before the Commission, both sides being represented by counsel, and that after this full hearing, the Louisiana Railroad Commission issued the order here complained of, which order is to be found at record pages 4 to 9, inclusive.

Moreover, as appears from the correspondence quoted at length on pages 4 to 17 of this brief, the question of the abandonment of the railroad and the cancellation of the tariffs governing the movement of freight over it was taken up with the Railroad Commission and specific authority for such cancellation was given, and a letter was written by the Secretary of the Louisiana Railroad Commission pointing out the steps to be taken as prerequisite to the abandonment of the railroad.

In view of these admitted facts, it is apparent that the language quoted *supra* from the opinion of the Supreme Court is inadvertent.

In closing we desire to call the Court's attention to the fact that the decision of the Supreme Court of Louisiana was by a divided Court, the opinion being concurred in by only three of the five Judges, two of the five Judges dissenting and agreeing with the Judge of the Court of first instance, who had decided the case in favor of the Brooks-Scanlon Company, and whose judgment was reversed by

the Supreme Court. We, therefore, have three Louisiana Judges on each side of this controversy.

For the reasons here given and for the reasons given in the petition for *certiorari* and the two briefs heretofore filed, we respectfully submit that the judgment of the Supreme Court of Louisiana should be reversed and the judgment of the District Court should be reinstated.

R. R. REID,  
J. BLANC MONROE,  
M. M. LEMANN,  
Attorneys for Petitioner.

January, 1920.





BROOKS-SCANLON COMPANY *v.* RAILROAD  
COMMISSION OF LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
LOUISIANA.

No. 386. Argued January 6, 1920.—Decided February 2, 1920.

A common carrier cannot, under the Fourteenth Amendment, be compelled by a State to continue operation of its railroad at a loss. P. 399.

Where a railroad serving the public is owned and operated by a lumber company in connection with its lumber business, it is the business of the railroad and not the entire business of the company which determines whether the railroad may be abandoned as unprofitable. *Id.*

A mere suggestion in the opinion of a state court unsupported by evidence, cannot be taken as a finding of fact in determining the scope and ground of its decision. *Id.*

Nor can a statement that the court has not jurisdiction to consider relief claimed under the Federal Constitution, because the plaintiff has not complied with formalities under the state law, be taken as placing the decision on a state ground, when the court actually passes upon and denies the merits of plaintiff's claim, gives relief against plaintiff, and devotes its opinion almost entirely to explaining and justifying such course. P. 400.

Forms imposed by local law cannot enable courts and commissions to do what the Federal Constitution forbids. *Id.*

144 Louisiana, 1086, reversed.

THE case is stated in the opinion.

*Mr. J. Blanc Monroe* and *Mr. Robert R. Reid*, with whom *Mr. Monte M. Lemann* was on the briefs, for petitioner.

*Mr. W. M. Barrow*, Assistant Attorney General of the State of Louisiana, with whom *Mr. A. V. Coco*,

Attorney General of the State of Louisiana, was on the briefs, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the Brooks-Scanlon Company, a Minnesota corporation organized to manufacture and deal in lumber and to carry on other incidental business, against the Railroad Commission of Louisiana. It seeks to set aside an order (Number 2228) of the Commission requiring the plaintiff either directly or through arrangements made with the Kentwood and Eastern Railway Company, to operate its narrow gauge railroad between Kentwood and Hackley, in Louisiana, upon schedules and days to be approved by the Commission. The plaintiff alleges that the order cannot be complied with except at a loss of more than \$1500 a month, and that to compel compliance would deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, with other objections not necessary to be mentioned here. The defendant denies the plaintiff's allegations and in reconvention prays for an injunction against the tearing up or abandoning of the road and for a mandate upholding the order. In the Court of first instance a preliminary injunction was issued in favor of the Commission, but was dissolved upon bond. Subsequently a judgment was entered denying a motion of the Commission to set aside the order dissolving the injunction, and after a trial on the merits judgment was entered for the plaintiff, declaring the order void. The defendant appealed from both judgments to the Supreme Court of the State. That Court reversed the decision below and reinstated the injunction granted on the defendant's prayer.

It seems that the Banner Lumber Company, a Louisiana corporation, formerly owned timber lands, sawmills and this narrow gauge railroad. The road was primarily a logging road but it may be assumed to have done business for third persons as a common carrier. The Banner Lumber Company sold the whole property to the Brooks-Scanlon Lumber Company on November 1, 1905, the stockholders of which obtained a charter for the railroad as the Kentwood and Eastern Railway Company on December 5 of the same year. In the interim it was managed by them with separate accounts. An oral lease of the road was made to the new company and soon afterwards the Brooks-Scanlon Lumber Company transferred its property to the Brooks-Scanlon Company, the petitioner. On the first of July, 1906, the Brooks-Scanlon Company made a written lease of the road to the Railway Company and sold to it all the rolling stock and personal property used in connection with the road. Thereafter the road was run as before, doing a small business as a common carrier but depending upon the carrying of logs and lumber to make it a profitable rather than a losing concern. In course of time the timber of the Brooks-Scanlon Company was cut and it terminated the lease to the Railway Company, which discontinued business on April 22, 1918, with the assent of the Railroad Commission, and sold its rolling stock. At that time the Commission being advised that it had no power did nothing more. But later, subsequent to a decision by the Supreme Court in May, it issued notice to the Brooks-Scanlon Company and the Railway to show cause why the road should not be operated, gave a hearing, and issued the order complained of here. The Supreme Court, after saying that the two corporations were one under different names, stated that the only question left for determination was whether the plaintiff could be compelled by the Commission to operate

its railroad, and concluded that although the railroad showed a loss, the test of the plaintiff's rights was the net result of the whole enterprise—the entire business of the corporation—and on that ground made its decree.

We are of opinion that the test applied was wrong under the decisions of this Court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595, 599, 600, 604, and *Norfolk & Western Ry. Co. v. West Virginia*, 236 U. S. 605, 609, 614. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfil an obligation imposed by the charter even though fulfilment in that particular may cause a loss. *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn v. Illinois*, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

While the decision below goes upon the ground that we have stated, it is thrown in at the end as a make-weight that the order of the Commission calls upon the plaintiff "to submit a new schedule for transportation which may be operated at much less expense to it than

the former schedule cost, and at a profit for plaintiff." This is merely the language of hope. We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding. The assumption upon which the Court made its ruling was that the plaintiff's other business was successful enough to stand a loss on the road.

Finally a suggestion is made in argument that the decision rested also upon another ground that cannot be reconsidered here. At the end of the opinion it is stated that the plaintiff has not petitioned the Railroad Commission for leave to discontinue this business and that until it has done so the Courts are without jurisdiction of the matter. It is not impossible that this is an oversight since it seems unlikely that after the Commission has called the plaintiff before it on the question and against its strenuous objection has required it to go on, such an empty form can be required. But in any case it cannot be meant that the previous discussion which occupies the whole body of the opinion is superfluous and irrelevant to the result reached; nor can the words be taken literally, since the court proceeded to take jurisdiction and reinstated an injunction in favor of the defendant. Whatever may be the forms required by the local law it cannot give the Court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566.

*Decree reversed.*